Supreme Court, U.S.
FILED
NOV 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-902

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-

BETHEL BAPTIST CHURCH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Free Exercise Clause of the First Amendment bars the taxation of the religious activity of churches.

II.

Whether the Free Exercise Clause is violated by the application, to persons whose employment consists solely in carrying out the ministry of a church, of a statute which requires that they be subject to, and taxed to support, a government welfare program to which they religiously object.

III.

Whether the equal protection requirement of the Fifth Amendment is violated by a statute which mandates the taxation of employees of a church who engage solely in its religious ministry but exempts clergymen, members of religious orders and Christian Science practitioners in the exercise of their religious ministries.

LIST OF PARTIES

The parties to the proceedings below were:

Plaintiffs (Petitioners here):

Bethel Baptist Church*
Reverend Richard A. Harris
Donald M. Paul
James F. Hockman
John D. Roberts
Nancy L. Kenna
Paul Martin
Darl W. Rist
Willie Armistad
Neil Beers
Sophia Beers
Richard Brittingham
Paul Bergey
Carolee Bergey

Defendant (Respondent here):

The United States of America

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*In accordance with Rule 28.1, Bethel Baptist Church states that it is a nonprofit corporation which has no parent companies, subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Bethel Baptist Church, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-captioned proceeding on June 30, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted as Appendix A hereto (p. 1a), and is reported at 822 F.2d 1334. The opinion of the United States District Court for the Middle District of Pennsylvania is reprinted as Appendix C hereto (p.18a), and is reported at 629 F.Supp. 1073.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Third Circuit on June 30, 1987. On September 8, 1987, Justice Brennan signed an order extending the time for filing this petition for certiorari to and including November 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

U.S. Constitution, Amendment V:

". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . ."

26 United States Code §§ 1401(a); 1401(b); 1401(c); 1402(a)(14); 1402(c)(2)(G); 1402(c)(4); 1402(c)(5); 1402(j); 3111(a); 3111(b); 3121(b)(8)(A); 3121(b)(8)(B); 3121(w) are reprinted in full as Appendix D hereto (p.44a).

STATEMENT OF THE CASE

The Church

Petitioner Bethel Baptist Church is an "independent" Baptist church (*i.e.*, one not under the control of any larger ecclesiastical body). The Church is one of congregational polity, consisting of its members and being governed by them. As a component of its religious mission, the Church operates ministries such as Grace Independent Mission Board, Upper Bucks Christian School and a pre-school day care program. The Church (and its included ministries) is supported solely out of the free-will offerings of its religious supporters and receives no support from federal, state or local taxes. Each of the Church's employees (a) is an integral and inseparable part of the Church's ministry and is selected solely on the basis of religious commitment, and (b) regards his or her Church employment as a

religious vocation. (See Appendices E and F, affidavits of Harris and Martin, pp. 51a, 60a).

The 1983 and 1984 Social Security Amendments

In 1983 and 1984 the nation's Social Security legislation was amended. The 1983 amendment, for the first time in the 50-year history of the Social Security program, imposed an excise tax upon churches, a tax on their employees, and mandatory participation by both in the Social Security program.[1] The 1984 amendment[2] permitted any church to shift to its employees the church's tax, provided the church elected to do so within the time specified by statute. (In Bethel's case that would have been by October 30, 1984). If a church so elected, its employees would become subject to the Social Security self-employment tax at a rate equal to the combined employer and employee Social Security tax rate.[3] The church employee, though church-employed, would be treated as a "self-employed" person whose "self-employment" income would be determined by "special rules" which provide in part that church employees are not entitled to the usual deductions afforded truly self-employed persons.[4] Thus the church employee's "self-employment" tax would be on gross income, not net income.

The Course of Proceedings

Bethel Baptist Church, having made payment of $17,795.04 of the tax required by the 1983 amendment for the quarter ending March 31, 1984, filed a Claim for refund with IRS on the ground that the taxes could not be constitutionally imposed upon a church and those engaged in its ministry. For reasons of conscience (see Appendix E, Harris affidavit, pp. 54a-55a, 58a), the Church could not make the irrevocable election to shift the

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1. Social Security Amendments of 1983, Pub.L.No. 98-21, §102, 97 Stat. 65, 70-71 (April 20, 1983).

2. Deficit Reduction Act of 1984, Pub.L. No. 98-369, §2603, 98 Stat. 494 (July 18, 1984) (codified at 26 U.S.C. §3121(w)).

3. 26 U.S.C. §3121(b)(8)(B); §1401(a); §1401(b); §1401(c).

4. 26 U.S.C. §1402(j).

tax, within the Church, to its employees. On November 15, 1984, IRS disallowed the Claim. On November 26, 1984, petitioners instituted this action in the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. §§1346(a)(1) and 1346(a)(2), seeking refund of the Social Security ("FICA," or Federal Insurance Contributions Act) tax. The Church and its employees, in their complaint, alleged that imposition of the 1983-1984 amendments violated their rights protected by the Free Exercise Clause of the First Amendment; the Establishment Clause; and the equal protection component of the Fifth Amendment.

Petitioners' complaint was supported by ten affidavits setting forth the religious nature of the Church employments and describing the substantial injury to religious exercise resulting from imposition of the Social Security program. (See, *e.g.*, Appendices E and F). The District Court made the following findings as to the choice it saw imposed upon the Church:

> "The choice offered to Bethel by the amendments implicated religious beliefs regardless of the alternative taken by the Church. If it elected out of the system, the Church would have avoided secular interference with its beliefs on Christian self-support but its employees would have paid social security taxes at the self-employment rate. The Church would then have been required to raise its workers' salaries out of justice to them and less funds would have been available for Church ministries. Of course, the Church decided to contribute and its belief concerning Christian self-support has been directly implicated. Additionally, because the Church increased its workers' salaries to cover the money lost to the tax, the second harm previously mentioned has also resulted — a decrease of resources the church can allocate to its ministries. . . .
>
> "As noted previously, the Church and its members believe that Christians must provide for their own financial security but if they cannot do so, the Church must provide for them by means chosen by the Church. Additionally, its employees are exercising a religious vocation by working for

> the Church. The Church and its members allege that the 1983 and 1984 social security amendments prevent them from exercising religious autonomy in these areas. A system of retirement benefits has now been imposed upon them. Employees are pressured into leaving their vocations and pursuing occupations in secular society to make up for income lost to the tax. An increase in salaries would not solve the problem. It would only divert funds from other areas. In that regard, the tax will diminish the Church's ability to operate its ministries. Payments into the system have already forced the Church to raise tuition for its school and to borrow money at commercial rates. Plaintiffs assert other adverse consequences of the legislation which we need not detail for the purposes of defendant's motion [for summary judgment]."

Bethel Baptist Church v. United States, 629 F.Supp. 1073, 1080-1081 (M.D.Pa. 1986). (See Appendix C, pp. 27a-29a). The Government, in Paragraph 33 of its answer, admitted that "[t]he carrying out of the Church's ministries constitutes the exercise of religion."

Petitioners also submitted the affidavit of Peter J. Ferrara, stating his qualifications as an authority on the Social Security system, and setting forth a series of factual allegations denying that a compelling state interest justified denial of the relief prayed for in petitioners' complaint. The Ferrara affidavit (see Appendix G) concluded as follows:

> "13. . . . excluding Bethel Baptist Church and employees from mandatory coverage will not disrupt the administration of the Social Security System, nor will it affect in any significant way the revenues enjoyed by that system or the ability of the system to pay promised benefits and indeed may even ease any long-term financial problems of the system. This same result would likely obtain even if all other religious institutions which object, on religious grounds, to mandatory coverage were to be similarly excluded."

(Appendix G, p. 65a).

On March 6, 1986, the District Court, denying petitioners' motions to compel discovery, granted a motion by the Government for summary judgment, holding the Government entitled to judgment as a matter of law under *United States v. Lee*, 455 U.S. 252 (1982), on the ground that application of the statutes to the Church was constitutional. *Bethel*, 629 F.Supp. 1073. (Appendix C).

Following appeal by petitioners to the United States Court of Appeals for the Third Circuit, that court, on June 30, 1987, affirmed, holding the case to be governed by *United States v. Lee, supra*, insofar as petitioners' Free Exercise claims were concerned, and rejecting petitioners' Establishment Clause and equal protection claims. See *Bethel Baptist Church v. United States*, 822 F.2d 1334 (3rd Cir. 1987). (Appendix A).

REASONS FOR GRANTING THE WRIT

I. Taxation of the Religious Activity of Churches Presents a Highly Important Question of Law Never Before Decided by this Court.

This case asks the Court to decide, for the first time, whether, consistently with the Free Exercise Clause, the religious activity of a church may be subjected to federal taxation.[5] The tax on churches is a tax on church activity — functioning, assets, mission, life.[6] Section 3111(a) of the Internal Revenue

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5. *United States v. Lee*, 455 U.S. 252 (1982), which both courts below deemed controlling, did not present that question; it involved neither churches nor the 1983 or 1984 Social Security amendments. See discussion *infra*, pp. 9-14. Previously the Court has considered (and resolved) the question whether statutory grants of exemption to churches from property taxes violate the Establishment Clause. See *Walz v. Tax Commission*, 397 U.S. 664 (1970). In *Bob Jones University v. United States*, 461 U.S. 574 (1983), in which the court upheld revocation of the tax exempt status of a religious educational institution, the Court stressed that it dealt "only with religious *schools* — not with churches or other purely religious institutions; . . ." *Bob Jones University*, 461 U.S. at 604, n. 29 (emphasis in original).

6. "The tax exemption of church property is probably as ancient as taxation itself. It dates at least to early Biblical days." L. PFEFFER, CHURCH, STATE AND FREEDOM 210 (1967). Church property has been

Code labels it an "excise" tax. This Court has defined the Social Security tax as "an excise upon the relation of employment" (*Steward Machine Co. v. Davis*, 301 U.S. 548, 578 (1937)), and upon "the right to employ" (*United States v. Glenn L. Martin Co.*, 308 U.S. 62, 65 (1939)). As the District Court found, the sole relation of employment which Bethel Baptist Church has with its employees is a *religious* relationship. *Bethel*, 629 F.Supp. at 1077. Further, commonly with other churches, Bethel Baptist Church cannot function except through employees. These individuals are an integral part of the Church and indispensable to its operation. Each employee is selected on the basis of religious qualification, and each regards his or her employment — including employments in manual labor, secretarial work, administrative pursuits, etc. — as a "calling", or religious vocation. (See Appendices E and F, pp. 53a, 60a).[7] Thus the incident of the tax on the Church — its employing of people — is the Church's very means of existence.

Exercise of the 1984 option, allowing churches to shift the employer tax to employees, as heavily burdens churches as does the 1983 tax imposed directly upon them. (See Harris affidavit, Appendix E, pp. 54a-58a). The tax is upon the offerings of church adherents, which moneys are donated for the sole purpose of carrying out the work of a church.[8]

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historically exempt, not because it is property but because it is religious. It would appear therefore that anything closer to the religious core than property (*e.g.*, the carrying out of religious activity) has been more obviously entitled to freedom from the restraints of taxation.

7. This includes manual or other work not involving preaching, the conduct of worship or the teaching of doctrine. The long tradition of agricultural labor as part of monastic life is but one example of the recognition that what would otherwise be deemed "secular" work may be performed to honor God and dedicated solely to religion. See H.J. BERMAN, LAW AND REVOLUTION, 62, 101 (1983); P. DELATTE, A COMMENTARY ON THE RULE OF ST. BENEDICT: Ch. 48, "Daily Manual Labor", 304-316 (1959).

8. Bethel, as the District Court found (see *supra*, pp. 27a-29a), could not, in fidelity to its religious beliefs, avail itself of the statutory option to shift the employer's tax to its employees.

Here the religious rights asserted by the church's employees are implicated whether or not the Church avails itself of the election allowed it under

If the precedent is established in this litigation, that the very right of churches to engage in religious activity may constitutionally be taxed, the taxation of religion in the future will be limited solely by public fiscal need or appetite. As the Court noted in *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943), "[t]hose who can tax the exercise of a religious practice [there, religious solicitation] can make its exercise so costly as to deprive it of the resources necessary for its maintenance." Involved in the present case is not taxation of a single exercise of evangelism, but the evangel itself — the church, in the full and varied exercise of the church's ministry. *Murdock* involved a license tax. But the unconstitutionality of the taxing of religion is not limited to license taxes such as were found invalid in *Murdock*.

In the present case failure of churches to pay the tax, and failure to undertake and pay for the administration of the tax program within the churches, results in the imposition of damaging, and ultimately crippling, criminal penalties. See, *e.g.*, 26 U.S.C. §§7202, 7204, 7205.[9] These sanctions militate as fully against religious exercise as does any license tax. The Court of Appeals makes the unprecedented statement that "[o]nly those taxes which threaten religious liberty *at the threshold* . . . are prohibited by the Constitution." *Bethel*, 822 F.2d at 1339, n.

NOTES *(Continued)*

the 1984 amendment. For a church whose teachings bar it from shifting its tax burden to the employee, the "relief" offered by the 1984 amendment is wholly illusory. If the church elects to shift that burden, not only do its employees become subject to the tax, but they (falsely classified as "self-employed") are denied the deductions accorded all really self-employed persons. The church thus becomes the agent for imposing the discriminatory tax treatment.

9. The Code also contains a series of civil penalties intended to enforce compliance with the various return filing and tax payment provisions of the Code. See, for example, 26 U.S.C. §§6651(a), 6656(a), 6656(b) and 6672. Of course, interest at the applicable rate provided by the Internal Revenue Code is also collectible. 26 U.S.C. §§6601, 6621. The Code also contains provisions for jeopardy assessments, filing of liens and seizing property by way of levy. 26 U.S.C. §§6862, 6331(a). In addition to penalties against the Church, the Code also imposes personal liability upon persons required to "collect, truthfully account for and pay over" employment taxes. 26 U.S.C. §6672. These individuals are also subject to the criminal penalties referred to above.

7 (emphasis supplied). But as this Court said in *Murdock:* "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock,* 319 U.S. at 112. The imposition of the Social Security tax on churches taxes the exercise of their most essential right.

The Third Circuit's upholding of the taxing of churches directly conflicts with the teachings of the Supreme Court respecting the freedom of churches generally (*Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 114-115 (1952)) and, in particular, their freedom from taxation. In *Murdock,* 319 U.S. at 108, the Court stated that a tax laid specifically on the exercise of First Amendment freedoms would be unconstitutional. The ruling below is also counter to the view of church tax exemption taken by the Court in *Walz v. Tax Commission,* 397 U.S. 664 (1970). That view centered on the freedom of churches and the threats to that freedom inherent in taxing their properties (*Walz,* 397 U.S. at 673-675), a threat assuredly less great than that posed by the tax here (which is levied on the church in its very ministry). Therein, in words especially applicable here, it was pointed out that "[b]y diverting funds otherwise available for religious . . . purposes to the support of Government, taxation would necessarily affect the extent of church support for the enterprises that they now promote . . . . In short, the cessation of exemptions would have a significant impact on religious organizations." (*Walz,* at 692, Brennan, J., concurring).

II. The Third Circuit's Expansion of the Supreme Court's Holding in *United States v. Lee* is Unwarranted and Should Not Be Allowed to Stand.

United States v. Lee, decided in 1982, did not involve (1) the 1983-1984 amendments to the Social Security Act, (2) churches, or (3) religious rights asserted by employees. The Third Circuit applies *Lee* to the new legislation, to churches, and to church employee rights. This unwarranted expansion is a distortion of a decision of this Court which, in light of the

national stature of federal Courts of Appeals and the existence of hundreds of thousands of churches in the United States, should be corrected.

This Case Distinguished From Lee

Lee involved an individual secular business employer operating a carpentry business who claimed Free Exercise protection against paying Social Security taxes arising out of his commercial employments, on the ground that the Amish religion (to which he belonged) prohibited his own participation in Social Security. *Lee*, 455 U.S. at 255.[10] The present case involves a *church* which, with its employees, is engaged solely in a *religious ministry*.

Lee involved no religious issue of church governance, no protest over the use of a church as part of the machinery of a government social program. *Lee* involved no direct, quantifiable economic threat to the continued existence of a church or religious ministries. In *Lee* no claim was raised with respect to the forced diversion of religiously entrusted funds, nor any issue of governmental intervention in the operation of church ministries. *Lee* involved the claim of a secular employer who said he was an Amishman; the claims in the present case relate to particular doctrines of fundamental Baptists respecting separation of church and state and liberty of conscience.

In *Lee* no employee of a church had (as here) come forward to press Free Exercise claims; indeed the Court in *Lee* expressed the concern that its granting of an exemption from the tax might operate "to impose the employer's religious faith on the employees." *Lee*, 455 U.S. at 261.[11]

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10. Mr. Lee did not represent, or purport to represent, the Amish church (*i.e.*, speak for an Amish church district or congregation or by authority of a bishop). A famous fact about the Amish is that they do *not* institute suits in courts of law to settle disputes. See J.A. HOSTETLER, AMISH SOCIETY, 252 (1980). The sparse stipulated record in *Lee* disclosed nothing more than a religiously aberrant individual who sought to avoid taxation by resort to a religious claim.

11. In *Lee*, the Court dealt solely with the obligation of individuals to pay Social Security taxes and compared that obligation with the obligation of

Misapplication of Lee's *Holding Re Overriding Governmental Interest*

Plenary review is needed here for an additional reason. While, both under its facts and the applicable statute, *Lee* must be distinguished from the present case, the Court decided *Lee* on the ground that an overriding governmental interest in the sound administration of the Social Security system and in preserving its "fiscal vitality" precluded allowing "myriad exceptions" for individuals based upon their religious beliefs. *Lee*, 455 U.S. at 260. The Court of Appeals has applied this conclusion to a set of facts not before the *Lee* Court and to a pair of statutes which did not exist when this Court ruled in *Lee*. It is necessary that the Court now focus on the *new* questions which the present case presents — at core: Does an overriding governmental interest exist that would justify imposition of the Social Security program on churches and their employees which resist the imposition on Free Exercise grounds? Here the following points beg for the Court's attention:

1. *No harm to sound administration of the Social Security system if churches not covered*. For the half century prior to the 1983 Social Security amendment, *every one* of the hundreds of thousands of *churches* in the United States[12] was permitted exemption along with the multitude of employees of all types of nonprofit organizations. There is no evidence of the slightest impairment to the administration of the system which resulted from even that broad, constantly changing exemption pattern.

The Court of Appeals purported to find, in the exemption of churches and those engaged in its ministries, a threat to an overriding "public interest in the collection of social security

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individuals to pay income taxes. It concluded that allowing religious exceptions to individuals to pay the former would so greatly burden the administration of the Social Security system that the system "could not function." The present case, however, involves a church and members of its faith community whose employment is a religious vocation. Therefore the myriad "individual" exceptions (spoken of in *Lee*) are not a real prospect should the status quo which existed for churches prior to the 1983 amendments be restored.

12. YEARBOOK OF THE AMERICAN AND CANADIAN CHURCHES 1984, 231-238.

taxes." *Bethel*, 822 F.2d at 1340. That objection (as related to sound administration of the program) left but a further question never discussed by that court: Why did not the post-January 1, 1984 allowance of elections by churches threaten the public interest in the collection of Social Security taxes? By its 1984 amendment, the Congress allowed every church in the nation to shift its tax to its employees, *i.e.*, voted that there was *no* threat to the tax collection system through allowing of all of the thousands of American churches to make that election. If the Congress saw no problem relating to administration, it is difficult to comprehend wherein the Court of Appeals found the problem. Indeed the Ferrara affidavit had informed the court that *no* burden to the efficient administration of the tax laws would result from the non-coverage of churches. (See Appendix G, Ferrara affidavit, pp. 64a-65a). The Court here is respectfully referred to petitioners' Interrogatories Nos. 4, 5, 9, 10 and 11 (see Appendix H, pp. 67a, 69a) which requested that the Government back up, if it could, its contention that non-coverage of churches would spell disaster to the sound administration of the Social Security system. But both by the Government and the court below, petitioners' attempts to bring the light of facts to bear upon the question were aborted.[13]

The Court, in *Lee*, further made it clear that persons in a religious community having its own welfare system (*e.g.*, the Church parties here, see Appendix E, Harris affidavit, pp. 53a-54a) are distinguishable "from the generality of wage earners employed by others" (*i.e.*, outside the religious community). 455 U.S. at 261. Administrability of the Social Security system was never threatened by exempting all churches; even less can it be

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13. The Court of Appeals completely disregarded this Court's teachings on summary judgment, that any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party (*Board of Education v. Pico*, 457 U.S. 853, 863 (1982)); that inferences to be drawn from underlying facts contained in affidavits "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold*, 369 U.S. 654, 655 (1962). It was error here to have made summary disposal while significant discovery requests of the Church parties remained unanswered. *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2550 (1986).

threatened in the present case in which members of a church faith community are plainly distinguishable from the generality of wage earners.

2. *No harm to the solvency of the Social Security system if churches not covered.* The Court of Appeals sought to base its finding of an overriding governmental interest upon this Court's statement in *Lee*, that "mandatory participation is indispensable to the fiscal vitality of the social security system." *Lee*, 455 U.S. at 258[14]. The Court of Appeals parsed "fiscal vitality" to refer to (a) solvency, (b) collection of taxes. Both (a) and (b) pose questions of fact — indeed, ascertainable fact. The Ferrara affidavit flatly denied that any harm could come to the system under either heading (see Appendix G, Ferrara affidavit, pp. 64a-65a). Petitioners' interrogatories probed these factual points. The opinion of the Court of Appeals declined any examination whatever of the solvency issue, merely stating the pat conclusion that the Supreme Court had already settled that question. *Bethel*, 822 F.2d at 1340. (Appendix A, pp. 10a-11a). The Court of Appeals then, as noted, shifted focus to (b), an interest which it distinguished from the question of solvency — "a broader public interest simply in the collection of social security taxes," *ibid.*, *i.e.*, the supposed administrative burden already discussed.

In coming to its completely speculative conclusion, it should again be pointed out that the court relieved the Government of going forward with any burden of proof.

The National Commission on Social Security, in 1981, while recommending that coverage be made inclusive for all employees of nonprofit organizations as of January 1, 1982, evidently believed that no harm to the integrity of the tax collection system could conceivably result from administering of exemptions not only for churches but for additional religious organizations:

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14. The Supreme Court did not speak of "*universal*" participation in the system. Even today, following the 1983-1984 Social Security amendments, universal participation is not provided for, and there are many employments and occupations which are not covered. See, for example: 26 U.S.C. §§3121(b)(1)-(20); 1402(c); 1402(e); 1402(g).

> "The Commission realizes that some religious organizations may oppose Social Security coverage on the basis of conscience and religious tenets. *It therefore recommends authorizing opting out of nonprofit organizations operated by a religious sect which is conscientiously, or because of religious principles, opposed to acceptance of public insurance.*"

National Commission on Social Security, Social Security in America's Future, Final Report, 187, March 1981. (Emphasis in original).

III. Petitioners' Equal Protection Claim Raises an Important but Unresolved Issue.

Petitioners complain that Congress has made several forms of religious ministry exempt from the Social Security tax, while petitioners' ministry is made subject to the tax. Petitioners do not challenge these other exemptions but say that the proper remedy to afford a victim of an unconstitutionally underinclusive statute is to extend the benefits of the statute to the wronged party. *Heckler v. Mathews*, 465 U.S. 728, 739, n. 5 (1984). Further, they say that more than a mere "rational basis" for discriminating among those exercising First Amendment freedoms must be shown. *Carey v. Brown*, 447 U.S. 455, 462 (1980).

The Third Circuit, instead of disapproving of the multiple discriminations created by the exemption of ministers, members of religious orders and Christian Science practitioners, justifies them on the ground that there are secular justifications for those discriminations — the first of these being that to tax the exempted ministries would violate church-state separation. Thus there is left standing the confused holding of a circuit that (a) legislation granting preferences among religious ministries does not offend equal protection but (b) that if Congress taxes ministries, it violates the principle of church-state separation. The ramifications of that conclusion are of such breadth and importance as to call for the Court's review.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that this petition be granted.

Respectfully submitted,

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November 25, 1987

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5300

BETHEL BAPTIST CHURCH; HARRIS, REVEREND RICHARD A.; PAUL, DONALD M.; HOCKMAN, JAMES F.; ROBERTS, JOHN D.; KENNA, NANCY L.; MARTIN, PAUL JR.; RIST, DARL W.; ARMISTAD, WILLIE; BEERS, NEIL; BEERS, SOPHIA; BRITTINGHAM, RICHARD; BRITTINGHAM, MARIAN; BERGEY, PAUL and BERGEY, CAROLEE,

Appellants

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the Middle District of Pennsylvania-Scranton
(D.C. Civil Action No. 84-1586)

Argued December 16, 1986

Before: HIGGINBOTHAM and BECKER, *Circuit Judges*,
and DUMBAULD, *District Judge*.*

(Filed June 30, 1987)

William Bentley Ball, Esq. (Argued)
Phillip J. Murren, Esq.
Sandra E. Wise, Esq.
Michael Cherewka, Esq.

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*Honorable Edward Dumbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

This appeal requires us to consider the constitutionality of various sections of the Internal Revenue Code, primarily in light of *United States v. Lee*, 455 U.S. 256 (1982). Specifically, we are asked to determine whether the present social security taxation of appellants is consistent with the first, fifth, and fourteenth amendments. Because we find that the district court properly applied existing legal principles to this case, we will affirm.

I.

Appellant Bethel Baptist Church ("Bethel Baptist" or "the Church") is an independent Baptist Church which is not subject to the control of any larger ecclesiastical body. The remaining appellants are various Church officers and employees or parents of children who attend Bethel Baptist's school.[1] The Church is a

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1. Bethel Baptist is joined in this suit by two of its officials; Richard A. Harris, the Church's pastor, and Donald M. Paul, the chairman of Bethel Baptist's board of deacons. Other appellants include Church school employees James M. Hockman, John D. Roberts, Nancy L. Kenna, Paul Martin, Jr., and

congregational polity consisting of and governed by its members. As an integral part of its religious mission, the Church operates several ministries, including Grace Independent Mission Board and Upper Bucks Christian School. Several church members assist Bethel Baptist's pursuit of its mission by working for the Church. Each congregational member who works for the Church must be a "born again" Christian and must have experienced a religious call to the vocation in which s/he is employed. Although employed Church members earn less money than they could in comparable secular positions, they choose to work for Bethel Baptist because of their religious beliefs. Most significant for purposes of this appeal, while Church members believe that they have a religious duty to obey all just laws, they also believe that Scripture requires them as Christians to provide for their own financial security. Church members believe further that if they cannot do so, their Church must provide for them by means of its own choosing. Consequently, as a matter of religious principle, Bethel Baptist's members oppose any governmental attempt to assume their religious responsibility of self-care or to dictate the means by which the Church shall discharge its provisional responsibilities to its members. In accordance with these beliefs, Bethel Baptist has since 1978 maintained its own private social program for care of employees which provides life insurance, disability and medical care coverage, and pension benefits.

In 1983, Congress amended the Social Security Act and the Internal Revenue Code to make churches and other nonprofit religious organizations and their employees subject, for the first time, to mandatory social security taxation, effective January 1, 1984. *See* Social Security Amendments of 1983, Pub. L. No. 98-21, §102(b)(2)(c), 97 Stat. 70-71. In July 1984, Congress partially restored the previous exemption for churches and certain church-controlled organizations, retroactive to January 1, 1984, by enacting §2603(b) of the Deficit Reduction Act of

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Daryl W. Rist, and school student parents Willie Armistad, Neil Beers, Sophia Beers, Richard Brittingham, Marian Brittingham, Paul Bergey and Carolee Bergey.

1984, Pub. L. No. 98-369, 98 Stat. 494 ("DRA"). Section 2603(b), which added §3121(w) to the Internal Revenue Code, permitted churches and certain church-controlled organizations that are opposed for religious reasons to the payment of employer social security taxes to elect irrevocably to exempt themselves from social security taxation, if the churches and organizations exercised their options between July 18, 1984 and October 30, 1984. 26 U.S.C. §3121(w) (Supp. 1985).[2] This limited opportunity for exemption, however, extended only to churches and church-controlled organizations; employees of electing churches — other than certain ministers, religious members and Christian Science Practioners exempted from taxation for services rendered in the exercise of religious duty pursuant to 26 U.S.C. §3121(b)(8)(A) (Supp. 1985) — become subject to social security tax at a rate equal to the combined employer and employee social security tax rate.[3] Due to this feature, the 1984 amendment did not completely alleviate the religious problems that the 1983 amendment had created for Bethel Baptist. The 1983 amendment required Bethel Baptist to pay employer social security tax for each employee, the continued payment of such taxes being a violation of the Church's fundamental religious principles. If the Church sought to avoid

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2. 26 U.S.C. §3121(w) provides in relevant part:

(1) General rule. — Any church or qualified church-controlled organization . . . may make an election within the time period described in paragraph (2), in accordance with such procedures as the Secretary determines to be appropriate, that services performed in the employ of such church or organization shall be excluded from employment for purposes of title II of the Social Security Act and chapter 21 of this Code. An election may be made under this subsection only if the church or organization is opposed for religious reasons to the payment of the tax . . .

(2) Timing and duration of election. — An election under this subsection must be made prior to the first date, more than 90 days after the date of the enactment of this subsection, on which a quarterly employment tax return for the tax imposed . . . is due, or would be due but for the election, from such church or organization. An election under this subsection shall apply to current and future employees, and shall apply to service performed after December 31, 1983.

3. That rate for the years 1984-1987, inclusive, equals 11.4%.

such payment by exercising the exemption option provided by the 1984 amendment, however, religious principles would obligate the Church to compensate its employees for the increase in their individual social security taxes (equal to the usual employer's social security obligation). Consequently, Bethel Baptist would be required to divert funds from other, religious uses, and would be forced to pay the equivalent of the social security tax it would pay if it did not exercise its option. Bethel Baptist resolved not to exercise its option to elect-out.

On April 30, 1984, in accordance with the amendments, Bethel Baptist filed an employer quarterly tax return for the first quarter of 1984. Based on the rates then in effect, Bethel Baptist correctly reported a tax liability of 13.7 percent of wages paid, or $17,795.04. Of the liability, $9,092.36 (or 7 percent of the wages paid) constituted the employer tax for which Bethel was directly liable under 26 U.S.C. §3111 (Supp. 1985), and $8,702.68 (or 6.7 percent of the wages paid) constituted the employee tax which 26 U.S.C. §§3101 and 3102 (Supp. 1985) required Bethel Baptist to withhold. Bethel Baptist made the entire tax payment from funds collected before the date of the return.

On May 3, 1984, Bethel Baptist filed a claim for refund of the taxes with the Internal Revenue Service ("IRS"), seeking recovery of both the employer and employee shares of the tax. In accordance with Treas. Reg. §31.6402(a)-2(a)(2) (1986)[4], it

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4. Treas. Reg. §31.6402(a) — 2(a)(2) provides:

(i) Every claim filed by an employer for refund or credit of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, collected from an employee shall include a statement that the employer has repaid the tax to such employee or has secured written consent of such employee to allowance of the refund or credit. The employer shall retain as part of his records the written receipt of the employee showing the date and amount of the repayment, or the written consent of the employee, whichever is used in support of the claim.

(ii) Every claim filed by an employer for refund or credit of employee tax under section 3101, or a corresponding provision of prior law, collected from an employee in a calendar year prior to the year in which the credit or refund is claimed, also shall include a statement that the employer has obtained from the employee a written statement (a) that the employee has not claimed refund or credit of the amount of the

included in its claim a statement that it had secured written consent from affected employees to claim refunds on their behalf. On September 4, 1984, the IRS mailed Bethel Baptist a letter in which it informed the Church of the pertinent provisions of the 1984 amendment and advised the Church that the deadline for making the §3121(w) election was October 30, 1984.[5] Also enclosed was a copy of the form designated by the Secretary of the Treasury for making the election under §3121(w). Bethel Baptist, however, did not file the form or otherwise attempt to make the election at any time prior to that statutory deadline. Accordingly, after the time for making the election expired, the IRS denied Bethel Baptist's claim for refund. Appellants then filed this suit in the United States District Court for the Middle District of Pennsylvania, asserting that the new statutory scheme created by Congress violated the free exercise and establishment clauses of the first amendment and that 26 U.S.C. §§1402(e)(1982) and (g) (Supp. 1984), which had existed previously, violated the equal protection clause of the fourteenth amendment as incorporated into the fifth amendment. The government moved to dismiss the claims of the individual plaintiffs on grounds the district court lacked jurisdiction. Subsequently, appellants moved to compel answers to interrogatories and production of documents. The government then moved for summary judgment on Bethel Baptist's claims on grounds that Bethel Baptist could not challenge the statutory scheme's constitutionality since the Church had chosen not to exempt itself under §3121(w) and that, even if Bethel Baptist could challenge the statutory scheme, the scheme was constitutional as a matter of law.

NOTES *(Continued)*

overcollection, and if so, such claim has been rejected, and (b) that the employee will not claim refund or credit of such amount. The employer shall retain the employee's written statement as part of the employer's records.

5. A timely election under §3121(w) by Bethel Baptist would have been retroactive to December 31, 1983 and thus would have been applicable to the taxes for which the Church sought a refund. *See supra* note 2.

The district court considered the motions together. Though the district court dismissed the claims of Paul and Harris on grounds they lacked standing as church officers to seek a refund of taxes paid by Bethel Baptist, it ruled that the employees and parents had standing to challenge the statutory scheme.[6] The district court also ruled that Bethel Baptist itself had standing to challenge the scheme since the Church's fundamental tenets were implicated whether or not it elected to exercise its exemption option. Nevertheless, the district court, relying primarily on the decision of the Supreme Court in *United States v. Lee*, 455 U.S. 252 (1982), then granted the government's motion for summary judgment. It also denied appellants' motion to compel discovery on grounds that no issue of material fact existed. The district court's judgment is not appealed.

II.

Appellants make four claims. First, they assert that the district court erred in concluding that Congress's statutory scheme does not violate the free exercise clause of the first amendment. Alternatively, appellants contend that the district court erred in denying appellant's discovery motion and granting appellee's summary judgment motion since one of appellants' affidavits raised a genuine issue of material fact. Third, appellants assert that the district court erred in concluding that the scheme does not violate the first amendment's establishment clause. Finally, appellants content that, contrary to the district court's conclusion, the scheme does violate the fourteenth amendment concept of equal protection as incorporated into the fifth amendment. Since each claim presents only an issue of law, our review with respect to all claims is plenary. *United States v.*

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6. We will not determine whether employees-appellants did in fact have standing pursuant to 28 U.S.C. §1346(a)(1) (1982) to join Bethel Baptist's refund claim and whether parents-appellants had standing to join that claim pursuant to 28 U.S.C. §1346(a)(2) (1982), as the District Court found. Because it is clear Bethel Baptist did have standing to assert its claim, and because Bethel Baptist makes every claim that other appellants would have made, we will pass on the merits of these claims without considering the district court's ruling on the standing of these other appellants.

Adams, 759 F.2d 1099 (3d Cir. 1985); *Koshatka v. Philadelphia Newspapers, Inc.*, 762 F.2d 329 (3d Cir. 1985). We consider the claims in the above order.

III.

Appellants assert that the Internal Revenue Code's statutory scheme violates the free exercise clause of the first amendment primarily because the scheme forces appellants to pay social security taxes in contravention of their basic religious convictions. As the district court noted, the United States Supreme Court directly addressed the issue of social security taxation in contravention of religious belief in *United States v. Lee*, 455 U.S. 252 (1982). In *Lee*, a member of the Old Order Amish, who believe that there is a religiously based obligation to provide for fellow members the kind of assistance contemplated by the social security system, employed several other Amish as workers on his farm and in his carpentry shop. For several years, the Amish employer refused to withhold social security taxes from his employees' pay or to pay the employer's share of the tax. After the IRS assessed the employer for the unpaid taxes, he paid a portion thereof and then sued for a refund, claiming imposition of the tax violated the first amendment. On direct appeal, the Supreme Court reversed the district court's ruling that the imposition of the social security tax was unconstitutional.

In reaching its conclusion, the Court recognized that compulsory participation in the social security system may "interfere[ ] with the free exercise rights of [religious groups]" such as Bethel Baptist, who provide for fellow members out of religious obligation. *United States v. Lee*, 455 U.S. at 257. The Court also recognized, however, that the state may justify such an infringement by demonstrating that the infringement is essential to the accomplishment of an overriding governmental interest. *Id.* at 257-58. The Court then found that the broad public interest in maintaining certain sound tax systems is such an interest. *Id.* at 260. After noting the importance of and strong

similarity between the income tax and social security tax systems, the Court stated that such "tax system[s] could not function if denominations were allowed to challenge the tax system[s] because tax payments were spent in a manner that violates their religious belief." *Id*. Finally, the Court concluded that the broad public interest in the maintenance of these systems was of such a high order that religious belief in conflict with the payment of the respective taxes provides no constitutional basis for resisting them. *Id*. Thus, at least with respect to the payment of income taxes and social security taxes, the Court has determined that the balance between the private interest in religious freedom and the government interest in tax collection and maintenance of a functioning tax system should be struck in favor the governmental interest.

It follows that the district court properly concluded that *Lee* controls here. *Lee* demonstrates that with respect to the social security tax, the government's interest in tax collection outweighs any private religious interest in the nonpayment of taxes. Faced merely with appellants' claims to the contrary, the district court, in light of *Lee's* clarity and recency, had little choice but to dismiss appellants' actions as a matter of law.

Appellants also assert that the Internal Revenue Code's statutory scheme violates the free exercise clause of the first amendment because the scheme (1) reduces take-home pay and thus forces Bethel Baptist's employees to leave religious vocations for higher-paying secular jobs; (2) would have imposed financial hardship on Bethel Baptist by forcing the Church to compensate employees for lost wages in accordance with the sect's religious principles if the Church had exercised its exemption option; and (3) will force some Bethel Baptist members to educate their children in secular schools if the Church defrays tax increases by increasing tuition at Bethel Baptist's school. Since *Lee* shows that direct impairment of religious beliefs of the type here involved is constitutionally permissible if necessary protect the social security system, it is difficult to comprehend how the indirect burdens asserted by appellants could render the challenged provisions unconstitutional. As noted previously, the public interest in the social security system outweighs any

private religious interest in non-statutory exemption from social security taxation. Appellants did not show, and under the circumstances of this case would appear unable to show, that the aforementioned indirect burdens implicate weightier interests than did the direct burden of compelled participation in the social security system, in contravention of religious belief, that the Supreme Court countenanced in *Lee*. Thus, these religious interests in freedom from indirect burdens too must yield to the broader public interest.[7]

Appellants alternatively contend that if *Lee* is apposite, the district court erred in granting appellees' motion for summary judgment because the pleadings raised a genuine issue of material fact. Specifically, appellants assert that the affidavit of Peter J. Ferrara, *see* App. at 110-116, suggests that the social security system would remain solvent even if appellants, and all others with religiously based objections to the payment of social security taxes, did not contribute to the system. Since *Lee's* holding was grounded in a determination that the government had a compelling interest in maintaining a solvent social security system, appellants argue, the district court was required at a minimum to hold a trial to determine whether appellants' participation in the system advanced the government's compelling interest in the system's solvency.

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7. Other Supreme Court precedent also shows that indirect burdens of the type challenged by appellants are constitutionally permissible. In Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court found that indirect tax burdens on religious activity, such as tax on the income of a preacher, are permissible. *Id* at 112. Only those taxes which threaten to suppress religious activity at the threshold, such as a flat license tax on which the right to preach is conditioned, the Court concluded, are prohibited by the Constitution. *Id*. The social security tax closely resembles an income tax. Though it serves a different purpose, the social security tax, like an income tax, constitutes only a fraction of any employee's wages. Thus, whatever an employee earns, s/he can fulfill her/his social security obligation. Consequently, unlike a license tax, the social security tax cannot preclude religious activity, even where it is assessed against a person engaged in religious vocation. Since the social security tax imposes only the indirect burden deemed permissible by *Murdock*, appellants' claims of indirect tax burden must prove unsuccessful even if *Lee* does not dispose of such claims.

We find appellants' arguments unpersuasive. In *Lee*, the Court identified at least two governmental interests that, in the social security tax context, countervail the private interest in religious freedom from tax payment. One interest is in fact the interest in the fiscal integrity of the social security system, which the Court concluded would be threatened by the type of constitutional exemption appellants seek. *Id.* at 260. As noted earlier, however, independent of the interest in the system's fiscal integrity, the Court found a broader public interest simply in the collection of social security taxes and the maintainence of a functioning social security tax system to be compelling. *Id.* This second, more general interest wholly justifies the district court's disposition of this case and makes irrelevant Ferrara's affidavit and the factual issues it might raise. Though Ferrara's affidavit does dispute the factual inference drawn by the Court concerning the social security system's fiscal vitality,[8] the affidavit does not undermine the Court's conclusion that the social security system could not, as a practical matter, function if constitutionally-based religious exemptions were permitted. Since the Ferrara affidavit raises no legal or factual issue which relates to this ground for summary judgment in the government's favor, we must reject appellant's assertion that summary judgment was improper under the circumstances.

IV.

Appellants also assert that the Internal Revenue Code's statutory scheme violates the establishment clause of the first

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8. Though we do not rule on the issue, we note that there is some uncertainty as to whether a lower court litigant may defeat a motion for summary judgment where he or she challenges a factual determination upon which the resolution of a prior constitutional question depended. *See Fort Towers, Inc. v. City of Miami Beach*, 360 So.2d 81 (Fla. Dist. Ct. App. 1978) (federal and state constitutional challenge to validity of city rent control ordinance properly disposed of by summary judgment despite proffered proof where prior decisions established that emergency housing situation did in fact exist); *See also, Augustin v. Quern*, 611 F.2d 211 (7th Cir. 1979) (summary judgment proper where Supreme Court precedent clearly established that state Medicaid legislation did not constitute *ex post facto* law.)

amendment. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) the Supreme Court determined that to withstand constitutional scrutiny, a statute challenged under the establishment clause must satisfy three requirements.

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-613 (quoting *Walz v. Commissioner*, 397 U.S. 644, 674 (1970)) (citations omitted). Here, the parties agree that the statutory scheme satisfies the first two *Lemon* requirements. Appellants contend, however, that the scheme violates the establishment clause because it requires governmental supervision and inspection of the Church's social security tax records. We find this contention unpersuasive. Although it is true that Bethel Baptist's compliance with the statutory scheme will require the Church to withhold tax at the statutory rate, to pay that tax to the government, and to provide and keep records verifying payment, *see* Appellants' Brief at 47, the scheme requires no more. Any governmental inquiry about the records will relate solely to the social security taxes owed and those paid. No governmental agency will be forced to attempt to influence activity by Bethel Baptist or to ensure that certain of Bethel Baptist's activities are secular rather than religious. In this respect, social security differs from those government programs which have been found to require unconstitutional governmental entanglement. *Cf. Aguilar v. Felton*, U.S. , 105 S. Ct. 3232 (1985) (provision of public employees to sectarian school violated establishment clause because excessive government entanglement necessary to ensure employees advanced only non-sectarian interests); *Meek v. Pettinger*, 421 U.S. 349 (1975) (statute intended to provide non-essential educational services to nonpublic schools violated establishment clause because prophylactic contacts required to ensure non-sectarian use of services intolerably entangled government). Rather, social security seems to require only the unobtrusive type of

governmental inquiries which the state may undertake to ensure that records are kept in accordance with the Fair Labor Standards Act, 29 U.S.C. §201 *et. seq.*, (1982) and local fire and zoning regulations. *See Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (record keeping requirements of Fair Labor Standards Act do not violate establishment clause when applied to religious organization because Act, like fire and zoning ordinances, merely requires organization to keep records and to provide them to state when inspection is necessary). Because the social security statutory scheme requires only minimal governmental supervision of religious activity, the government will prevail on appellant's establishment clause claim.

V.

Appellants' equal protection claim centers on 26 U.S.C. §§1402(e) (1982) and (g) (Supp. 1984). Section 1402(e) exempts from social security taxation ministers, members of religious orders, and Christian Science practioners, who have an individual conscientious objection to payment of such taxes, irrespective of the tenets of their religious faith. The section applies only to self-employment income derived from religious activities. The §1402(g) exemption is available to members of religious organizations, which in principle and practice support dependent individuals, who by reason of such membership, are conscientiously opposed to social insurance; it applies to all self-employment income from whatever source derived. Appellants assert that the sections violate the fourteenth amendment's equal protection concept as incorporated in the due process clause of the fifth amendment[9] because they exempt certain religious organizations and certain members of religious groups from social security taxation but not Bethel Baptist and other appellants. As the Supreme Court has noted, such a "contention of . . . religious discrimination, rendering [the challenged

9. For a consideration of the incorporation of the fourteenth amendment concept of equal protection into the due process clause of the fifth amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

provisions] fatally underinclusive cannot simply be brushed aside." *Gillette v. United States*, 401 U.S. 438, 452 (1971). Essentially, appellants contend that Congress could not constitutionally enact §§1402(e) and (g), which confer a benefit (a tax exemption) on only certain religious groups and group members, without a compelling interest in making a distinction on the basis of religious affiliation and practice. Appellants contend further that because the Government has not identified such an interest, §§1402(e) and 1402(g) must be struck down.

Appellants' assertions misinterpret precedent and overstate the government's obligations. While it is true the Constitution forbids governmental discrimination on the basis of religion, *see Gillette*, 401 U.S. at 452, the government must establish a compelling reason for a distinction such as that made in §§1402(e) and (g) "only if the plaintiff can show the basis for the distinction was religious and not secular in nature." *Olsen v. Commissioner of Internal Revenue*, 709 F.2d 278, 282 (4th Cir. 1983) (quoting *Gillette v. United States*, 401 U.S. at 452). If the distinction's basis is secular, the distinction's justification need only be rational. *Id.*

We conclude both that the underlying bases for §§1402(e) and (g) are secular and that the sections' justifications are rational. Section 1402(e) exempts ministers, members of religious organizations and Christian Science practioners from self-employment social security taxation because Congress concluded that the taxation of the specific parties named in the section "might interfere with the well-established principle of separation of church and state." S. Rep. No. 1987, 83d Cong., 2d Sess. 8-9, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3710, 3718.[10] Congress also determined that limitation of the exemption to a narrow set of named parties was necessary to

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10. This congressional conclusion does not discredit our holding that appellants' establishment clause claim is incorrect. Congress may have acted in a rational, though overly cautious, manner in assuming that taxation of the persons identified in §1402(e) would implicate the first amendment. Congress may rationally limit the scope of its legislation where expansion of scope may raise, as it could have in the case of §1402(e) (enacted in 1954), as-yet unanswered constitutional questions.

ensure that the social security program would remain financially sound and not be undermined by an excessive number of exemptions. The former justification is clearly secular because it represents an attempt to comply with a plausible judicial construction of the first amendment. The latter justification is clearly rational since it represents a reasoned judgment on the requirements of the social security system.[11] Since in enacting §1402(e), Congress sought to accommodate secular, first amendment concerns and attempted reasonably to guarantee the fiscal integrity of a social insurance program, we find §1402(e) complies with the fifth amendment.

Similarly, examination of §1402(g) reveals that that section too is secularly based and rationally justified. Congress enacted §1402(g) to exempt from unnecessary taxation members of sects which over a period of time had made reasonable provisions for dependent members. *Templeton v. Commissioner of Internal Revenue*, 719 F.2d 1408, 1414 (7th Cir. 1983). Congress also narrowed the exemption, limiting it to sects able to make a showing of sustained adequate, religiously dictated provision for members before December 31, 1950, because it concluded that a broad exemption might affect the soundness of the social security system. Congress's motivation in avoiding unnecessary taxation is obviously secular. And its limitation of the exemption, which effectively stymies any post-1950 attempt to take advantage of the exemption for religious reasons, is inherently reasonable, though the imitation may unfortunately exclude religious groups and members who clearly act out of religious commitment. We therefore conclude that §1402(g) also complies with the fifth amendment.

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11. As we have noted, a concern for the integrity of the social security program may be compelling, not merely rational.

VI.

Accordingly, the judgment of the district court will be affirmed.

/s/ A. LEON HIGGINBOTHAM

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT,

Circuit Judge

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BETHEL BAPTIST CHURCH, et al., *Plaintiffs*	:	
vs.	:	CIVIL ACTION NO. 84-1586
UNITED STATES OF AMERICA, *Defendant*	:	

ORDER AND JUDGMENT

AND NOW, this 6th day of March, 1986, it is ordered that:

1. The claims of plaintiffs, Richard A. Harris and Donald M. Paul, are dismissed.

2. Plaintiffs' motions to compel answers to interrogatories and request for production of documents are denied.

3. Defendant's motion for summary judgment is granted and judgment is entered for defendant.

4. The Clerk of Court shall close this file.

/s/ WILLIAM W. CALDWELL
William W. Caldwell
United States District Judge

Certified from the record
Date 3/6/86
Donald R. Berry, Clerk

Per /s/ K. F. KING
Deputy Clerk

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BETHEL BAPTIST CHURCH, et al., *Plaintiffs*	:	
vs.	:	CIVIL ACTION NO. 84-1586
UNITED STATES OF AMERICA, *Defendant*	:	

MEMORANDUM

I. Introduction.

Plaintiffs, Bethel Baptist Church (Bethel), its pastor, employees and certain church members have challenged the constitutionality of the social security amendments of 1983 and 1984 which imposed for the first time mandatory participation in the social security system upon employees of non-profit institutions. Plaintiffs contend that the change in the law violates the free exercise and establishment provisions of the first amendment[1] and the equal protection component of the due process guarantee of the fifth amendment.[2] Defendant has moved for summary judgment, raising procedural obstacles to the suit, and also asserting that the plaintiffs' claims must fail on the merits. Oral argument was held on this motion on December 30, 1985, supplemental briefs have been submitted, and the motion is ripe for disposition. Also pending are plaintiffs'

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1. The first amendment provides, in pertinent part, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I.

2. The fifth amendment, provides, in pertinent part, that "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.

motions to compel answers to interrogatories and request for production of documents.

II. Factual Background.

Prior to the change in the social security law, nonprofit organizations, including religious ones, meeting the conditions of 26 U.S.C. §501(c)(3), could participate in the social security system on a voluntary basis. To participate they had to affirmatively choose to do so. See 26 U.S.C. §3121(k). Otherwise, the organizations were automatically excluded because "employment" for social security purposes was not defined to include work for nonprofit organizations. *See* 26 U.S.C. §3121(b)(8)(B). The reason for allowing voluntary participation for religious groups was concern for separation of church and state. H.R. No. 25, 98th Cong., 1st Sess. at 16 (1983) *reprinted in* 1983 U.S. Code Cong. Ad. News 219, 233. On April 30, 1983, Congress repealed section 3121(b)(8)(B) with respect to services performed after December 31, 1983, see The Social Security Amendments of 1983, Pub. L. No. 98-21, §102(b)(1)(C), 97 Stat. 70-71 (1983). Also repealed was section 3121(k). *Id.*, §102(b)(2).

On July 18, 1984, Congress passed the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984). Section 2603(b) of the Act, 98 Stat. 1128-29, amended section 3121 of the Internal Revenue Code by adding section 3121(w) which provides, in pertinent part, as follows:

> (w) Exemption of churches and qualified church-controlled organizations.—
>
> (1) General rule.—Any church or qualified church-controlled organization (as defined in paragraph (3)) may make an election within the time period described in paragraph (2), in accordance with such procedures as the Secretary determines to be appropriate, that services performed in the employ of such church or organization shall be excluded from employment for purposes of title II of the Social Security Act and chapter 21 of this Code. An election may be made under this subsection only if the church or qualified church-controlled organization states that such

church or organization is opposed for religious reasons to the payment of the tax imposed under section 3111 [the social security tax imposed on employers].

(2) Timing and duration of election.—An election under this subsection must be made prior to the first date, more than 90 days after the date of the enactment of this subsection, on which a quarterly employment tax return for the tax imposed under section 3111 is due, or would be due but for the election, from such church or organization. . . . The election may not be revoked by the church or organization. . . .

(3) Definitions.—

(A) For purposes of this subsection, the term "church" means a church, a convention or association of churches, or any elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches.

26 U.S.C. §3121(w) (brackets added).

The 1984 Act also excluded employment with a duly electing church from the definition of employment for social security purposes, The Deficit Reduction Act of 1984, *supra* at section 2603(a)(2), codified at 26 U.S.C. §3121(b)(8)(B), but changed the treatment of income derived from such employment to self-employment income. *Id.* at section 2603(c)(2)(C), codified at 26 U.S.C. §1402(c)(2)(G).

As a result of the 1983 and 1984 amendments churches must now affirmatively elect not to be part of the system if they do not wish to contribute to social security and the election only affects the church's liability. If it elects for religious reasons not to be part of the system, it has no responsibility to pay the employer's share of the tax but the entire burden of the tax then falls upon the employee at the self-employment rate. If the church decides to become a contributing employer, then it pays the employer's share and the employee contributes at the employee rate. The latter rate is less than the self-employment

rate. Compare 26 U.S.C. §§3101 and 3111 with 26 U.S.C. §1401(a). Thus, church employees, regardless of whether the church decides to contribute to the system, are now covered under social security. The church remains responsible for withholding the tax and paying it to the government even if it elects out of the system.

Bethel did not make the election. On April 30, 1984, it filed a form 941, employer's federal tax return, for the quarterly period ending March 31, 1984. The return reported that Bethel paid its employees during the quarter a total of $129,890.78 in wages subject to social security taxes. The return also reported social security taxes of $17,795.04 on both Bethel and its employees which were paid on or before April 30, 1984.

On May 3, 1984, on behalf of itself and its employees, Bethel filed a claim for refund of the $17,795.04 in social security taxes, making first amendment objections to the tax. None of the individual plaintiffs made a claim for refund. They had authorized Bethel to make the claim for them. The government denied Bethel's claim on November 15, 1984, waiting until the October 30, 1984 deadline for election out of the system had passed. *See* 26 U.S.C. §3121(w)(2).[3]

Plaintiffs allege the following which we accept as true for the purposes of defendant's motion. Bethel, a Pennsylvania non-profit corporation, is an independent, fundamentalist, Baptist Church, not subject to the control or governance of any national or regional ecclesiastical body. It is supported and governed by its members. The Church operates Grace Independent Mission Board, Bethel Baptist Church Pre-School Day Care Program and Upper Bucks Christian School.

While members of the church believe that they have a scriptural duty to obey all just laws, they also believe that Christianity must govern their religious obligations. In plaintiffs' view, Scripture requires them as Christians to provide for their own financial security. If they cannot do so, their church must

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3. As noted previously, the 1984 legislation was passed on July 18, 1984. Under section 3121(w)(2), Bethel therefore had until October 30, 1984, to rescind its decision to pay social security taxes as an employer.

provide it for them. They cannot participate in an effort by government to assume or preempt that religiously mandated responsibility. Additionally, as a matter of religious belief, the church must remain free to choose the means by which it will discharge its responsibility to its members and government cannot interfere with that choice.

A person who works for the Church must be a "born again" Christian and must have actually experienced a religious call to the vocation in which he or she is employed. Plaintiff, James F. Hockman, administrator of the Upper Bucks Christian School, is one of the Church's employees. He considers his position a religious vocation by which he is fulfilling God's calling upon his life to oversee the education of young Christians by his service to Bethel. He makes less money working for the Church than he could in secular society as a school administrator but does so because of his beliefs. The other plaintiff employees, a teacher, the Church secretary, and maintenance men, echo Mr. Hockman's sentiments. Other plaintiffs are members of the Church but not employees. They are parents of children at Upper Bucks Christian School who have sent their children there to obtain an education centered on the Bible. They have made financial sacrifices to pay the required tuition.

It 1978, to fulfill its responsibility to its emloyees, the Church instituted a program of benefits, including life insurance, disability coverage, a pension program and medical care.

After the government denied Bethel's claim for refund, the Church, two of its officers and its employees filed suit under 28 U.S.C. §1346(a)(1) to recover the taxes paid. The parent plaintiffs also joined in the suit, seeking redress for claimed injuries to their first amendment rights as well.

III. Discussion.

A. Standard of Review.

Before discussing the merits of defendant's motion we set forth our standard of review as follows:

> Summary judgment under Federal Rule of Civil Procedure 56 is appropriate only where the moving party

> establishes that no genuine issue exists as to any of the material facts in the case, and that he is entitled to judgment as a matter of law. *See, e.g., Hollinger v. Wagner Mining Equipment Co.*, 667 F.2d 402, 405 (3d Cir. 1981). Courts should resolve any doubts as to the existence of issues of material fact against the moving party, and view all inferences in the light most favorable to the nonmoving party. [citation omitted].

Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 472 (3d Cir. 1985) (brackets added).

B. The Court Has Jurisdiction Over the Claims of the Parents And the Employees But Not of the Officers of the Church.

There are fourteen individual plaintiffs. Dr. Richard Harris is the pastor of the Church and president of the Church corporation. Donald M. Paul is Deacon Board Chairman and his corporate office is vice-president. Seven other plaintiffs are parents of children attending the Church school and the remaining five are employed by the Church and had money withheld from their salaries to pay social security taxes. Defendant, characterizing this suit as solely one for the refund of taxes, contends that we lack jurisdiction over all of the individuals' claims. The government argues as follows. First, 28 U.S.C. §1346(a)(1) confers jurisdiction upon a district court only for a suit brought by a "taxpayer" and the non-employee plaintiffs are not taxpayers. Second, 26 U.S.C. §7422(a) requires that, before a taxpayer suit can be filed, a claim for refund must be made with the Internal Revenue Service and none of the employee plaintiffs have made such a claim. Third, the Church officers can make no claim apart from the Church.

1. Jurisdiction Over the Employee Plaintiffs.

Section 1346(a)(1) provides, in pertinent part, as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> (1) any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . or any sum

> alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . .

28 U.S.C §1346(a)(1).

But before such a suit can be filed 26 U.S.C. §7422(a) must be satisfied. That section provides, in pertinent part, as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been . . . in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

Based upon section 7422(a), the government argues that the employee plaintiffs cannot file claims on their own behalf since they did not file their own administrative claims with the Internal Revenue Service.[4] The government makes this argument even though the employees authorized Bethel to make an administrative claim for them and Bethel did so. Moreover, it attempts to bolster this argument by citing regulations permitting the employees to delegate to their employer, no doubt for the convenience of the agency, the authority to make their claims for them. Thus, defendant points to 26 C.F.R. §31.6402 (a)-(2)(b) which permits an employee to make an administrative claim for refund only when, in part, the employee has not authorized the employer to file a claim and receive refund or credit. It also cites 26 C.F.R. §31.6402(a)-2(a)(2)(ii) which provides that when an employer claims a refund for employees, it shall state that it has their written consent to do so. Defendant concludes from these provisions that the employee plaintiffs

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4. Defendant notes that plaintiffs have not asserted that the employee plaintiffs were the same employees who paid the social security taxes subject to the refund claim. Defendant does not seriously pursue this argument and we believe that in light of plaintiffs' response to defendant's statement of material fact no. 8, we can safely conclude that the employee plaintiffs were, in fact, the same employees who paid the social security taxes.

have "irrevocably elected to have Bethel file a claim and prosecute this suit on their behalf," (Defendant's brief in support of its motion for summary judgment at 15), and have foregone the "option of proceeding individually." (*Id.*). It also cites *Kreiger v. United States*, 539 F.2d 317 (3d Cir. 1976) in its support. The government emphasizes that it is not attempting to avoid adjudication of the employees' claims. Its more modest goal is to eliminate the employees as parties. Their claims can still be raised on their behalf by Bethel.

Section 7422(a) is the controlling provision here. It provides that no lawsuit can be maintained "until *a claim* for refund . . . has been duly filed . . . according to the provisions of law in that regard, and the regulations . . . established in pursuance thereof." (emphasis added). The section merely provides that *a* claim must be filed first. It does not require that the individual must have personally filed an administrative claim before seeking redress in court. Moreover, the claim only has to be filed in accordance with the regulations. The employee plaintiffs did that here. The regulations permitted them to authorize their employer to seek a refund on their behalf. Significantly, the regulations only deal with employees' rights to seek a refund from the agency and nowhere warn that a failure to seek a refund directly would preclude them from bringing a law suit. *Kreiger* is inapposite because the court there only concluded that the failure to file a *timely* claim for refund would bar a suit. The timeliness of the refund claim is not an issue in the instant case.

Defendant's position is contradicted by *Eighth Street Baptist Church, Inc. v. United States*, 431 F.2d 1193 (10th Cir. 1970) (per curiam). In that case, the court held that section 1346 (a) (1) did not confer jurisdiction upon the district court to entertain a church's first amendment challenge to the requirement that it withhold income taxes from its employees' salaries and pay them to the government. Citing *First National Bank v. United States*, 265 F.2d 297 (3d Cir. 1959), the court concluded that the "taxpayers" for the purposes of section 1346(a)(1) were the employees who actually had income taxes withheld from them. Accordingly, "[i]f the amount claimed was wrongfully assessed and collected, the employees, not the Church, would

be entitled to sue." *Eighth Street Baptist Church*, 431 F.2d at 1194 (brackets added). Further, defendant's position that the Church can still raise the employees' claims by virtue of the regulations, even though the employees cannot be parties to this action, conflicts with a basic rule of standing that one person cannot raise the claims of another. *See Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985).

We conclude that the prerequisites of section 7422(a) were satisified in connection with the employees' claims when Bethel filed a claim for refund with the government. Because an authorized claim for refund of the employees' taxes was made, the employees could file suit on their on behalf.

2. *The Parent Plaintiffs*.

Since the parent plaintiffs had no social security taxes withheld from them by Bethel, they obviously cannot invoke section 1346(a)(1) to sustain jurisdiction. They are not taxpayers for the purposes of this suit. *See First National Bank, supra*. Plaintiffs recognize this and contend that the parents can assert jurisdiction under 28 U.S.C. §1346(a)(2) which provides, in pertinent part, that district courts shall have original jurisdiction of "[a]ny . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution or any Act of Congress . . . ." (brackets added). We agree. *See also* complaint at ¶1, setting forth the jurisdictional bases of the complaint.

The parents contend that their first amendment rights are threatened because the social security tax makes it financially more difficult to give their children a religious education at Upper Bucks Christian School. "One aspect of the religious freedom of parents is the right to control the religious upbringing and training of their minor children." *Grove, supra*, 753 F.2d at 1531. The parent plaintiffs accordingly have standing, and can invoke the jurisdiction of this court under section 1346(a)(2), to redress an alleged violation of that first amendment right. *Grove, supra*. In so concluding, we reject defendant's characterization of this suit as simply one for the refund of taxes.

3. Church Officers and Administrators.

Richard A. Harris, Bethel's pastor and president of the corporation, and Donald M. Paul, Deacon Board Chairman and vice president, are also plaintiffs. Their claims must be dismissed because they can allege no injury distinct from that of the Church which, as a corporate body, can sue in its own name.

C. Bethel's Failure to Elect Out of the Social Security System Does Not Bar This Suit.

Defendant claims that Bethel could have avoided the adverse consequences of contributing to the social security system by simply electing under 26 U.S.C. §3121(w) not to join. Having failed to make the election, Bethel cannot seek redress in this action. Defendant cites numerous cases in which the courts have refused to relieve a taxpayer from the adverse consequences of an election made under a taxing statute. Moreover, defendant points out that courts have avoided constitutional questions whenever a case can be disposed of on other grounds. Accordingly, we should rely upon Bethel's conduct here to dismiss this suit without reaching the constitutionality of the social security amendments. Plaintiffs, citing *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), contend that no real choice was offered by the amendments. Plaintiffs' first amendment rights would have been infringed regardless of what choice Bethel made under the amendments. We agree with plaintiffs.

Defendants' cases dealing with elections under the taxing statutes are inapposite here. None of these cases dealt with the constitutionality of the taxing statute at issue in them; only with the taxpayer's attempt to avoid the adverse tax consequences of what was later perceived as an unwise election. *See, e.g. J.E. Riley Investment Co. v. Commissioner*, 311 U.S. 55, 61 S.Ct. 95, 85 L.Ed. 36 (1940).

The situation here is entirely different. The choice offered to Bethel by the amendments implicated religious beliefs regardless of the alternative taken by the Church. If it elected out of the system, the Church would have avoided secular interference with its beliefs on Christian self-support but its employees would have paid social security taxes at the self-employment

rate. The Church would then have been required to raise its workers' salaries out of justice to them and less funds would have been available for Church ministries.[5] Of course, the Church decided to contribute and its belief concerning Christian self-support has been directly implicated. Additionally, because the Church increased its workers' salaries to cover the money lost to the tax, the second harm previously mentioned has also resulted — a decrease of resources the church can allocate to its ministries.

In any event, defendant's argument does not address the employees' concerns at all. They are subject to the social security tax regardless of any decision made by the Church. Their religious beliefs on self-support are allegedly infringed and the harm could not have been avoided by Bethel's election. We reject defendant's election argument and proceed to the merits of the complaint.

D. The Legislation Does Not Violate the Free Exercise Clause.

As noted previously, the Church and its members believe that Christians must provide for their own financial security but if they cannot do so, the Church must provide for them by means chosen by the Church. Additionally, its employees are exercising a religious vocation by working for the Church. The Church and its members allege that the 1983 and 1984 social security amendments prevent them from exercising religious autonomy in these areas. A system of retirement benefits has now been imposed upon them. Employees are pressured into leaving their vocations and pursuing occupations in secular society to make up for income lost to the tax. An increase in salaries would not solve the problem. It would only divert funds from other areas. In that regard, the tax will diminish the Church's ability to operate its ministries. Payments into the system have already forced the Church to raise tuition for its school and to borrow money at commercial rates. Plaintiffs assert

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5. Defendant argues that Bethel's perceived obligation to increase its employees' wages is not a religious one. Defendant does not seriously pursue this, however, and we conclude, based upon Bethel's argument as a whole, that it believes it has a religious duty to increase employees' wages because of the social security tax.

other adverse consequences of the legislation which we need not detail for the purposes of defendant's motion.

In *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), the United States Supreme Court summarized the standard to be applied to free exercise claims as follows:

> This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs, *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). As interpreted by this Court, moreover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief, *see Wisconsin v. Yoder, supra*, at 220; *Thomas v. Review Board of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Sherbert v. Verner, supra*, at 402-403. However, "[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257-58 (1982). *See, e.g., McDaniel v. Paty*, 435 U.S. 618, 628, and n.8 (1978); *Wisconsin v. Yoder, supra*, at 215; *Gillette v. United States*, 401 U.S. 437 (1971).

Id. at 603, 103 S. Ct. at 2034-35, 76 L.Ed.2d at 180-81.

The limitation upon religious liberty may be justified only when there is no less restrictive means to accomplish the governmental interest. *Id.*, (citing *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)).[6]

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6. We therefore reject defendant's assertion that it only has to show, in accordance with *Lee v. United States, infra*, that the government's interest is compelling and that accommodating plaintiffs' religious belief would unduly interfere with the fulfillment of that interest. The Court in *Lee* also stated that a limitation on religious liberty could also be justified only by showing that the limitation "is essential to accomplish an overriding governmental interest." *Infra* at 257-58, 102 S.Ct. at 1055, 71 L.Ed.2d at 132. Implicit in this standard

Plaintiffs' free exercise claim is two pronged. One prong, based solely upon religious belief and independent of any claimed financial hardship which would impede the Church's ministries, is based upon the religious obligation of Bethel and its members to care for their own when they cannot do so themselves and not to participate in, or accept benefits from, a secular system with similar goals. The second prong is based upon diversion of funds from protected religious activity.

Defendant relies solely upon *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) to defeat plaintiffs' entire free exercise claim. Indeed, defendant contends that *Lee* is indistinguishable from the instant case, controls the outcome here, and requires us to find against plaintiffs.

In *Lee*, the Supreme Court held that the free exercise clause was not violated by requiring an Amishman, an employer of other Amish on his farm and in his carpentry shop, to contribute to the social security system. The Amish believe that they are religiously obligated to care for their own elderly and needy and can not pay into the social security system or accept benefits from it. Accepting the sincerity of these beliefs, the Supreme Court noted that the government's interest in mandatory and continuous participation in the system is very high. The program is nationwide, the largest domestic governmental program, and requires mandatory contributions from covered employers and employees. The Court then determined the governmental interest could not accommodate the Amish belief.

Defendant equates Bethel with the Amish employer in *Lee*. By choosing to employ a school administrator, secretary, maintenance men, etc., Bethel "enter[ed] into commercial activity." *Id.* at 261, 102 S.Ct. at 1057, 71 L.Ed.2d at 134 (brackets added). Since the religious objection to the social security tax is similar to the one raised in *Lee*, the claim here must be rejected.

NOTES *(Continued)*

is the well established criterion, as evidenced by *Bob Jones University* which cited *Lee*, that the government use the least restrictive means. *See Dayton Christian Schools, infra*.

Plaintiffs argue that *Lee* is inapposite. Bethel is not engaged in a commercial activity despite defendant's attempt to characterize it as doing so by narrowly focusing upon the jobs performed by the employee plaintiffs. Second, the Court's discussion in *Lee* of the government's overriding interest took place before the social security amendments at issue here imposed the tax upon church employees. The Supreme Court has never passed upon the validity of imposing the social security tax directly upon a church or its employees. Plaintiffs contend that they will build a record to show that here, unlike in *Lee*, the government's interest must yield to their own. Specifically, they will show that the social security program would not suffer financially if Bethel, or a church like it, was permitted out of the system but if it is required to continue in it, grave consequences would befall it. Plaintiffs also point to interference with the administration of the Church and the use of the Church as part of the machinery of a governmental social program. None of these factors were present in *Lee*.

Plaintiffs are correct in distinguishing *Lee* on the basis of its commercial setting. Certainly, the Supreme Court was concerned there about the effect of permitting a taxpayer to bring his religious beliefs into the marketplace. It concluded its opinion in *Lee* by stating:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. . . . The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

Id. at 261, 102 S.Ct. at 1057, 71 L.Ed.2d at 134-35 (footnote omitted).

Thus, we reject defendant's attempt to bring this case within the purview of *Lee* by focusing solely on the employees. Certainly, viewed in isolation, a secretary's duties would appear to be no

different whether performed for a church or a business. Yet when performed for a church, they may be in furtherance of the church's goals and therefore serve a religious purpose. *See Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (the distribution of handbills may be for a commercial purpose but when done to promote religious belief, it is protected by the first amendment).

But we also reject plaintiffs' characterization of the claim in *Lee* as a bare attempt to escape taxes on a secular business by resort to a religious belief. That belief was just as sincerely held as in the instant case and qualitatively no different. It is immaterial that the claim was made by a lay person rather than a minister or a church. *See Ballinger v. Commissioner*, 728 F.2d 1287 (10th Cir. 1984).

Because of the similarity of religious claims, we believe that *Lee* does control this prong of Bethel's free exercise claim but for a reason only touched upon by defendant at oral argument. As noted by the defendant, the Court in *Lee* specifically held that the government had an overriding interest in maintaining mandatory participation by covered employers and employees. The Court then broadly stated its concerns in this area of the law, however, as follows:

> The difficulty in attempting to accommodate religious beliefs in the area of taxation is that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld, supra*, at 606. The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, *see e.g., Thomas, supra; Sherbert, supra*, but there is a point at which accommodation would "radically restrict the operating latitude of the legislature." *Braunfeld, supra*, at 606.

> Unlike the situation presented in *Wisconsin v. Yoder, supra*, it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference — in theory at least — is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. *See, e.g., Lull v. Commissioner*, 602 F.2d 1166 (C.A.4 1979), *cert. denied*, 444 U.S. 1014 (1980); *Autenrieth v. Cullen*, 418 F.2d 586 (C.A.9 1969), *cert. denied*, 397 U.S. 1036 (1970). Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Id., 455 U.S. at 259-60, 102 S.Ct. at 1056-57, 71 L.Ed.2d at 133-34 (footnote omitted.)

These same concerns dictate that the plaintiffs' free exercise claim based solely upon a religious belief of caring for their own must fail. The broad public interest in maintaining a sound tax system is of such high order that religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Kahn v. United States, 753 F.2d 1208 (3d Cir. 1985) presented an analogous situation. In *Kahn*, the taxpayer filed an income tax return claiming a war tax deduction. The government imposed a civil penalty of $500 under 26 U.S.C. §6702 for a frivolous income tax return, a return claiming a deduction for

which there was no basis in law or fact. Upholding the statutory section against the taxpayer's claim of invalidity under the first amendment's guarantee of freedom of speech, the Third Circuit Court of Appeals, reading *Lee* expansively, held:

> Congress enacted section 6702 in order to improve taxpayer compliance in light of the "rapid growth" in protest returns. The public interest served by section 6702 is of such a "high order" that an assertion of first amendment rights do not outweigh the necessity of maintaining a functional revenue system. *See United States v. Lee*, 455 U.S. 252, 260, 102 S.Ct. 1051, 1056, 71 L.Ed. 2d 127 (1982). This interest has been found sufficiently compelling to outweigh challenges to the administration of the tax laws based on the free exercise of religion. *See, e.g., United States v. Lee, supra; United States v. Grayson County State Bank*, 656 F.2d 1070 (5th Cir.1981), *cert. denied*, 455 U.S. 920, 102 S.Ct. 1276, 71 L.Ed.2d 460 (1982); *Lull v. Commissioner*, 602 F.2d 1166 (4th Cir.1979), *cert. denied*, 444 U.S. 1014, 100 S.Ct. 664, 62 L.Ed.2d 643(1980); *Drefchinski, supra*.

Id. at 1217. *See also Harper v. United States*, 587 F.Supp. 1056, 1058 n.1 (E.D. Pa. 1984).

The courts in *Wall v. United States*, 756 F.2d 52 (8th Cir. 1985) (per curiam) and *Welch v. United States*, 750 F.2d 1101 (1st Cir. 1985) also interpreted *Lee* in a similar fashion in other challenges to section 6702. In *Wall*, the court, citing *Lee*, stated: "The Supreme Court has held, however, that the necessities of revenue collection through a sound tax system raise governmental interests sufficiently compelling to outweigh the free exercise rights of those who find the tax objectional on bona fide religious grounds." 756 F.2d at 53. In *Welch* the First Circuit Court of Appeals read *Lee* as follows:

> In a recent opinion, the United States Supreme Court laid to rest whatever possible remaining basis there might have been for claiming that tax liability could be reduced because of a sincerely held, conscientious objection to the uses to which taxes are put. *See, United States v. Lee*, 455 U.S.

> 252, 102 S.Ct. 1051, 71 L.Ed2d 127 (1982). In the *Lee* case, a member of the Old Order Amish sought to avoid the payment of social security taxes on the basis of his religiously based opposition to the social security system. In that case, as in the one at bar, there was no question raised as to the sincerity of the taxpayer's religious convictions. However, the court held that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax," 455 U.S. at 260, 102 S.Ct. at 1056, in view of the important public interest in maintaining a sound tax system.

750 F.2d at 1107.

Relying upon this rationale, the court upheld the constitutionality of section 6702 against first amendment claims of free speech and the free exercise of religion. The compelling state interest outweighing these fundamental rights was the necessity of maintaining a sound revenue system.

Thus, both sides in the instant case have read *Lee* too narrowly. The government interest at stake there was not simply maintaining mandatory participation in the social security system by covered employers and employees. Rather, the government's interest was far more fundamental — preserving the integrity of the tax collection system. We conclude that that interest is a compelling one here as well and cannot be satisified by any less restrictive means. It outweighs the plaintiffs' religious belief that they cannot participate in any system other than their own to provide for the welfare of Church members. To conclude otherwise would, as pointed out by the Court in *Lee*, open the door to equally sincere religious objections for tax dollars designated for specific purposes.

The second prong of plaintiffs' argument is that, unlike the taxpayer in *Lee*, the imposition of the social security tax drains the Church treasury of funds that could be used to support the Church's ministries. Plaintiffs are religiously opposed to a tax on religious exercise and citing *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), they assert that " '[i]f the purpose or effect of a law is to impede the observance of one or

all religions . . . that law is constitutionally invalid even though the burden may be characterized as indirect.' " *Id.* at 404, 83 S.Ct. at 1794, 10 L.Ed.2d at 970 (brackets in *Sherbert*) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563, 568 (1961)).

Defendant is not taxing the exercise of religion here. Such a tax would be unconstitutional. *See Murdock v. Pennsylvania, supra*. The social security tax is a non-discriminatory, uniform tax with a secular purpose. We therefore reject plaintiffs' characterization of it as one upon religious exercise. (See plaintiffs' brief in opposition to defendant's motion for summary judgment at 6).

Of course, a regulation neutral on its face may still be unconstitutional if it unduly burdens the exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). But we believe it illustrates the "difficult nature of the fine distinctions required in inquires pursuant to the religion clauses," *Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 945 n.22 (6th Cir. 1985), that this court can point to cases which have stated, contrary to plaintiffs' assertion, that an indirect burden upon free exercise is constitutional. *See Hatcher v. Commissioner*, 688 F.2d 82 (10th Cir. 1979) (religious challenge to social security tax on self-employment income rejected because the law merely imposes an indirect burden on free exercise); *Johnson v. United States*, 422 F.Supp. 958 (N.D. Ind. 1976) (income tax is constitutional although it may have an incidental effect upon the religious practices of married persons), *aff'd sub nom., Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1012, 98 S.Ct. 725, 54 L.Ed.2d 755 (1978). *Ballinger, supra*, (imposition of social security tax upon a minister who failed to make a timely, statutory claim for exemption did not violate first amendment because it placed only indirect burden on religious freedom).[7]

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7. Indeed, plaintiffs' passage from *Braunfeld*, quoted in *Sherbert*, immediately went on to note that: "if the State regulates conduct by enacting a general law within its power . . . the statute is valid despite its indirect burden

We are sensitive to plaintiffs' claim that the social security tax inhibits the free exercise of their religion because money used for the tax cannot be used for religious activities. Undoubtedly, the tax has this effect.[8] In *Murdock, supra*, the Court expressed its concern in this area. *Murdock* dealt with an ordinance, neutral on its face, which imposed a fee upon door-to-door solicitors. Jehovah's Witnesses challenged it on first amendment grounds. The Court noted that:

> The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. [citation omitted]. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance.

319 U.S. at 112, 63 S.Ct. at 874, 87 L.Ed.2d at 1298 (brackets added).

Although the Court struck down the ordinance, it nevertheless emphasized that:

> We do not mean to say that religious groups and the press are free from all financial burdens of government. See *Grosjean v. American Press Co.*, 297 U.S. 233, 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.

Id. at 112. 63 S.Ct. at 874, 87 L.Ed. at 1298.

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on religious observance . . . ." *Braunfeld*, 366 U.S. at 607, 81 S.Ct. at 1148, 6 L.Ed.2d at 568.

8. In his affidavit in opposition to the motion for summary judgment, Pastor Harris asserts that the church has lost over $160,000 to the social security tax for 1984 and 1985, (¶24a), and that a church making the election in another state lost over 80% of its teachers because they could not afford the reduction in disposable income resulting from the tax.

And in *Braunfeld, supra,* Chief Justice Warren said the following in upholding Sunday closing laws:

> Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

366 U.S. at 606, 81 S.Ct. at 1147, 6 L.Ed.2d at 568 (Opinion of Warren, C.J., concurred in by Black, Clark and Whitaker, JJ.).

The situation here is analogous. The social security tax imposes an indirect burden upon Bethel's members' observance of their religion. Members may be required to increase their contributions to the church as a result of the recent amendments but this does not render the law unconstitutional.

Plaintiffs claim of financial hardship, or diversion of funds from a constitutionally protected activity, could be made in every case in which constitutional challenges have been made to taxation. Thus, in *Graves v. Commissioner,* 579 F.2d 392 (6th Cir. 1978) (per curiam), the taxpayers who objected on religious grounds to expenditure of federal funds to finance the Vietnam War could also have asserted that the income tax diverted funds from their first amendment efforts to end the war.

Significantly, plaintiffs have not challenged the imposition of the income tax on Bethel's employees. That tax also reduces the employees' take home pay and if it were not imposed, would presumably permit the Church to pay lower wages and spend more money on its ministries. Of course, plaintiffs could distinguish the income tax by its different source. That tax is paid out of the employees' wages while Bethel, based upon its perception of its religious obligation to its employees, must pay the employer's share of the social security tax directly from the

Church treasury. We believe, however, that plaintiffs' argument, and the better view in any event, ignores such bookkeeping technicalities. Consistent with such a distinguishing of the income tax, Bethel would have to admit that it could also have avoided the burden upon its treasury by making the election and shifting the social security tax totally to the employees at the self-employment rate. But that would have contradicted Bethel's claim that it would have been religiously bound to increase its employees' wages to make up for the decrease in disposable income. So also would it have been bound to take into account the income tax.

In our view, that Bethel has not challenged the constitutionality of the income tax establishes that its real complaint is not with the constitutionality of the social security tax but with its novel application to the Church's employees. At the time of the 1983 and 1984 social security amendments the income tax was already applicable to the Church's employees, and thus already taken into account, in soliciting donations and establishing wage rates. On the other hand, the social security tax was a sudden addition to the costs of running the Church and the Church has had trouble adjusting to it.

Plaintiffs quote *Sherbert, supra*, contending that " '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation' " upon free exercise. 374 U.S. at 406, 83 S.Ct. at 1795, 10 L.Ed.2d at 972 (brackets in *Sherbert*) (quoting *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430, 440 (1945)), and that only religious conduct posing "some substantial threat to public safety, peace or order," *id.* at 403, 83 S.Ct. at 1793, 10 L.Ed.2d 970, may be regulated.

But in *Sherbert*, the challenged statute disqualified a Seventh-day Adventist from unemployment compensation because she would not accept Saturday work. The unemployment compensation statute did not force this condition upon a Sunday worshipper. The state could advance no compelling state interest for the discrimination — only the possibility that fraudulent claims would be filed. Extension of unemployment benefits to the Sabbatarian only restored the required neutrality to the

statute. Obviously, plaintiff's religious conduct was not a grave abuse or danger or threat to the public peace, safety or order.

In sum, we recognize that the Church undoubtedly has suffered financial hardship from the imposition of the social security tax but because the government has an overriding, compelling interest in maintaining a sound revenue system, this is not an unconstitutional burden.

E. The Legislation Does Not Violate the Establishment Clause.

To be constitutional under the establishment clause, legislation must meet all three parts of the following standard. First, it must have a secular legislation purpose. Second, its principal or primary effect cannot advance or hinder religion. Third, it cannot foster an excessive government entanglement with religion. *Witters v. Washington Department of Services For the Blind,* 54 U.S.L.W. 4135 (U.S. Jan. 27, 1986) (citing *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). *See also May v. Cooperman,*780 F.2d 240 (3rd Cir. 1985).

Plaintiffs make no argument concerning the first two parts of the test but contend that the social security amendments foster excessive government entanglement with religion. According to plaintiffs:

> The program thrusts the Government into the employment relationships of the Church with its members in their common ministry. . . . It calls for governmentally supervised record keeping and surveillance with respect to the program. It also calls for continuous reporting by the Church to Government authorities — precisely the type of "sustained and detailed administrative relationships" warned against in *Lemon*.

(Plaintiffs' brief in opposition to defendant's motion for summary judgment at 45).

Conversely, defendant argues that the legislation only requires that Bethel withhold the tax at the statutory rate and pay it to the government along with filing an information return. This does not entangle church and state. Defendant points out that Bethel has a similar obligation with respect to the income tax.

We agree with defendant. In *Eighth Street Baptist Church, Inc. v. United States*, 291 F.Supp. 603 (D. Kan. 1968), *aff'd*, 431 F.2d 1193 (10th Cir. 1970), a church challenged on first amendment grounds the requirement that it withhold income taxes from the salaries of its non-ministerial employees. Relying upon *Murdock, supra* the district court held that the requirement did not interfere with plaintiff's free exercise rights. The same conclusion applies here to the withholding of the social security tax and plaintiffs' specific claim of entanglement.

Plaintiffs have cited *Lemon, supra; Public Funds For Public Schools v. Marburger*, 358 F.Supp. 29 (D. N.J. 1973), *aff'd mem.*, 417 U.S. 961, 94 S.Ct. 3163, 41 L.Ed.2d 1134 (1974); *New York v. Cathedral Academy*, 434 U.S. 125, 98 S.Ct. 340, 54 L.Ed.2d 346 (1977); *Aguilar v. Felton*, ___ *U.S.* ___, *105 S.Ct. 3232, 87 L.Ed.2d 290 (1985), and Dayton Christian Schools, supra*, to support their contention that the legislation at issue here unconstitutionally entangles church and state. All of these cases are easily distinguishable. The first four dealt with state statutes giving aid to sectarian schools. The statutes were declared unconstitutional because, in part, they would have required the state to oversee activities in the schools and inevitably lead it into conflict with the religious bodies involved concerning religious practice or education. In *Dayton Christian Schools* the Ohio Civil Rights Commission has attempted to assert jurisdiction over a religious school based upon its refusal to renew a teacher's contract. The court held that such jurisdiction would have violated the first amendment because it would have necessarily involved the state in employment decisions on the teaching staff at the school and in recurring employment disputes. Commission inquiry into intent, motive, causation and pretext in hiring and firing decisions would also have necessarily involved the state in assessment of religious decisions.

None of the above concerns is present in the instant case. We conclude that the 1983 and 1984 social security amendments do not violate the establishment clause of the first amendment.

F. The Equal Protection Component of the Fifth Amendment.

The fifth amendment requires certain equal protection guarantees from the federal government. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 S.Ct. 1895, 48 L.Ed.2d 495 (1976). Plaintiffs have made two arguments on equal protection grounds. In their complaint, they allege that the legislation violates equal protection because the employee plaintiffs are treated differently from the church's pastor. The pastor can claim exemption from social security taxes, see 26 U.S.C §1402(e), but the non-ministerial employees cannot. In their brief, plaintiffs contend that the amendments violate equal protection because employees of electing churches are treated differently from employees in general. The employees are subject to the social security tax at the self-employment rate but receive none of the benefits conferred upon self-employed individuals by other tax sections.[9]

Plaintiffs do not elaborate on the latter equal protection argument other than pointing out the difference and claiming that it is "blantantly offensive" to equal protection. On this ground alone it can be rejected. Moreover, we agree with defendant that plaintiffs cannot advance this claim for the simple reason that the employee plaintiffs here are not being taxed at the self-employment rate since the Church decided to contribute the employer's share. Obviously, abstract claims of defects in the statutory scheme are not justiciable.

G. Plaintiffs' Motion to Compel Discovery And Argument That Summary Judgment Is Inappropriate In Constitutional Cases.

As noted in Part I of this memorandum, plaintiffs had moved to compel discovery from defendant. They wanted defendant to answer interrogatories and a request for production of documents. The government resisted the discovery, contending that we could dispose of plaintiffs' claims as a matter of law.

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9. Plaintiffs may not have briefed the pleaded argument because if it was successful, it would require us to strike down the minister's exemption. *See Templeton v. Commissioner*, 719 F.2d 1408 (7th Cir. 1983). In any event, the exemption does not violate equal protection. *Id.* at 1412 n.5.

Plaintiffs generally sought information indicating the differences between the present and the former social security system in terms of non-profit institutions, including religious ones now covered, and the additional revenue realized from the amendments. They also wanted copies of government reports and records leading up to the social security amendments. Plaintiffs anticipated that the information would have supported their argument that coverage of religious institutions, or those objecting like Bethel, was not essential to the government's interest in the financial stability of the social security system.

Because we have concluded that defendant is entitled to judgment as a matter or law, the discovery motions will be denied. No material factual issues are in dispute which would be resolved by permitting discovery. Our conclusion also disposes of plaintiffs' argument that summary judgment should not normally be granted in constitutional cases. *See, e.g., Dispatch, Inc. v. City of Erie*, 364 F.2d 539 (3d Cir. 1966). When appropriate in such cases, the court will enter a summary judgment. *See Associated Firm Distribution Corp. v. Thornburgh*, 520 F.Supp. 971 (E.D. Pa. 1981), *rev'd on other grounds*, 683 F.2d 808(3d Cir. 1982).

We will issue an appropriate order.

/s/ WILLIAM W. CALDWELL

William W. Caldwell
United States District Judge

Date: March 6, 1986

APPENDIX D

26 U.S.C. (INTERNAL REVENUE CODE)

Chapter 2—Tax on Self Employment Income

§1401. Rate of tax

(a) Old-age, survivors, and disability insurance.—In addition to other taxes, there shall be imposed for each taxable year, on the self-employment income of every individual, a tax equal to the following percent of the amount of the self-employment income for such taxable year:

In the case of a taxable year		
Beginning after:	**And Before:**	**Percent:**
December 31, 1983	January 1, 1988	11.40
December 31, 1987	January 1, 1990	12.12
December 31, 1989		12.40

(b) Hospital insurance.—In addition to the tax imposed by the preceding subsection, there shall be imposed for each taxable year, on the self-employment income of every individual, a tax equal to the following percent of the amount of the self-employment income for such taxable year:

In the case of a taxable year		
Beginning after:	**And Before:**	**Percent:**
December 31, 1983	January 1, 1985	2.60
December 31, 1984	January 1, 1986	2.70
December 31, 1985		2.90

(c) Credit against taxes imposed by the section. —

(1) In General. — In the case of a taxable year beginning before 1990, there shall be allowed as a credit against the taxes imposed by this section for any taxable year an amount equal to the applicable percentage of the self-employment income of the individual for such taxable year.

(2) Applicable percentage. — For purposes of paragraph (1), the applicable percentage shall be determined in accordance with the following table:

In the case of taxable years beginning in:	The applicable percentage is:
1984	2.7
1985	2.3
1986, 1987, 1988, or 1989	2.0

* * * *

§1402. Definitions

(a) Net earnings from self-employment.—The term "net earnings from self-employment" means the gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle which are attributable to such trade or business, plus his distributive share (whether or not distributed) of income or loss described in section 702(a)(8) from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary income or loss—

* * *

(14) in the case of church employee income, the special rules of subsection (j)(1) shall apply.

* * * *

(c) Trade or business.—The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 162 (relating to trade or business expenses), except that such term shall not include —

* * *

(2) The performance of service by an individual as an employee, other than—

* * *

(G) service described in section 3121(b)(8)(B);

* * *

(4) the performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(5) the performance of service by an individual in the exercise of his profession as a Christian Science practitioner; or

(6) the performance of service by an individual during the period for which an exemption under subsection (g) is effective with respect to him.

The provisions of paragraph (4) or (5) shall not apply to service (other than service performed by a member of a religious order who has taken a vow of poverty as a member of such order) performed by an individual unless an exemption under subsection (e) is effective with respect to him.

* * * *

(j) Special rules for certain church employee income.—

(1) Computation of net earnings.—In applying subsection (a)—

(A) church employee income shall not be reduced by any deduction;

(B) church employee income and deductions attributable to such income shall not be taken into account in determining the amount of other net earnings from self-employment.

(2) Computation of self-employment income.—

(A) Separate application of subsection (b)(2).—Paragraph (2) of subsection (b) shall be applied separately—

(i) to church employee income, and

(ii) to other net earnings from self-employment.

(B) $100 floor.—In applying paragraph (2) of subsection (b) to church employee income, "$100" shall be substituted for "$400".

(3) Coordination with subsection (a)(12).—Paragraph (1) shall not apply to any amount allowable as a deduction under subsection (a)(12), and paragraph (1) shall be applied before determining the amount so allowable.

(4) Church employee income defined.—For purposes of this section, the term "church employee income" means gross income for services which are described in section 3121(b)(8)(B) (and are not described in section 3121(b)(8)(A)).

* * * *

Chapter 21—Federal Insurance Contributions Act
Subchapter B—Tax on Employers

§3111. Rate of tax

(a) Old-age, survivors, and disability insurance.—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a) and (t)) paid by him with respect to employment (as defined in section 3121(b))—

In cases of wages paid during:	**The rate shall be:**
1984, 1985, 1986, or 1987	5.7 percent
1988 or 1989	6.06 percent
1990 or thereafter	6.2 percent

(b) Hospital insurance.—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in is employ, equal to the following percentages of the wages (as defined in section 3121(a) and (t)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar years 1974 through 1977, the rate shall be 0.90 percent;

(2) with respect to wages paid during the calendar year 1978, the rate shall be 1.00 percent;

(3) with respect to wages paid during the calendar years 1979 and 1980, the rate shall be 1.05 percent;

(4) with respect to wages paid during the calendar years 1981 through 1984, the rate shall be 1.30 percent;

(5) with respect to wages paid during the calendar year 1985, the rate shall be 1.35 percent; and

(6) with respect to wages paid after December 31, 1985, the rate shall be 1.45 percent.

* * * *

Subchapter C—General Provisions

§3121. Definitions

* * * *

(b) Employment.—For purposes of this chapter, the term "employment" means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen or resident of the United States as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—

* * *

(8)(A) service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order, except that this subparagraph shall not apply to service performed by a member of such an order in the

exercise of such duties, if an election of coverage under subsection (r) is in effect with respect to such order, or with respect to the autonomus subdivision thereof to which such member belongs;

(B) service performed in the employ of a church or qualified church-controlled organization if such church or organization has in effect an election under subsection (w), other than service in an unrelated trade or business (within the meaning of section 513(a));

* * * *

(w) Exemption of churches and qualified church-controlled organizations.—

(1) General rule.—Any church or qualified church-controlled organization (as defined in paragraph (3)) may make an election within the time period described in paragraph (2), in accordance with such procedures as the Secretary determines to be appropriate, that services performed in the employ of such church or organization shall be excluded from employment for purposes of title II of the Social Security Act and this chapter. An election may be made under this subsection only if the church or qualified church-controlled organization states that such church or organization is opposed for religious reasons to the payment of the tax imposed under section 3111.

(2) Timing and duration of election.—An election under this subseciton must be made prior to the first date, more than 90 days after July 18, 1984, on which a quarterly employment tax return for the tax imposed under section 3111 is due, or would be due but for the election, from such church or organization. An election under this subsection shall apply to current and future employees, and shall apply to service performed after December 31, 1983. The election may be revoked by the church or organization under regulations prescribed by the Secretary. The election shall be revoked by the Secretary if such church or organization fails to furnish the information required under section 6051 to the Secretary for a period of 2 years or more with respect to remuneration paid for such services by such church or organization, and, upon request by the secretary, fails to furnish all such previously unfurnished information for the period

covered by the election. Any revocation under the preceding sentence shall apply retroactively to the beginning of the 2-year period for which the information was not furnished.

(3) **Definitions—**

(**A**) For purposes of this subsection, the term "church" means a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches.

(**B**) for purposes of this subsection, the term "qualified church-controlled orgnaization" means any church-controlled tax-exempt organization described in section 501(c)(3), other than an organization which—

(i) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and

(ii) normally receives more than 25 percent of its support form either (I) governmental sources, or (II) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses or both.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BETHEL BAPTIST CHURCH, et al., *Plaintiffs*	:	
v.	:	CIVIL ACTION NO. CV-84-1586
UNITED STATES OF AMERICA, *Defendant*	:	

AFFIDAVIT OF REV. RICHARD A. HARRIS

NOW COMES Reverend Richard A. Harris, of Sellersville, Pennsylvania, being duly sworn according to law, who deposes and states on personal knowledge as follows:

1. I am an ordained minister of the Gospel, and I serve as pastor of Bethel Baptist Church (hereinafter "Church"), Sellersville, Pennsylvania.

2. I am authorized to speak on behalf of the Church and all other plaintiffs herein.

3. I am competent to testify to the matters stated herein.

4. I hereby endorse each allegation made in our Complaint, and herein incorporate each of those allegations by reference.

5. The Church is an independent Baptist Church, not under the control or governance of any national, regional or local ecclesiastical body. The Church observes a congregational polity, *i.e.*, it consists of, and is governed by its members.

6. As a matter of religious belief, based upon the teachings of Holy Scripture, to which the Church is bound in obedience, the Church operates Grace Independent Mission Board, Bethel Baptist Church Pre-School Day Care Program and Upper Bucks Christian School in furtherance of its religious mission.

7. The Church, including its ministers, is supported solely out of the free will offerings of its religious supporters and receives no contributions from federal, state or local taxes.

8. The fundamental Christian faith, as taught and practiced by the plaintiffs, emphasizes the need for a Church to exist as a distinct faith community. This faith community, the Church, is made up of the entire body of believers, together with the Church ministries and all of its employees. This faith community is a single organism and continuously nurtures and strengthens the spiritual lives of the religious believers within it.

9. As a matter of religious belief, based upon the teachings of Holy Scripture, to which the members of the Church are bound, all within the Church recognize that the governance of the Church has been entrusted to the Church alone. Such governance includes, *inter alia*, all aspects of the relationships between the Church and those in its service, including financial matters.

10. By its observance of the doctrines of the fundamental Christian faith, the Church adheres to the basic precepts of Christianity as understood from the beginning of the Church in the first century. These are belief in: (1) the Holy Scriptures; (2) the one triune God; (3) the Lord Jesus Christ; (4) the Holy Spirit; (5) the creation and fall of man; (6) salvation by grace through faith; (7) righteous living and good work; (8) the existence of Satan; (9) the second coming of Christ; (10) future life, bodily resurrection and eternal judgment; (11) one true Church; (12) separation from the world; and (13) educating young people according to the foregoing principles.

11. Persons of the fundamental Christian faith believe in the Biblical commands found in Chapter 13 of St. Paul's Epistle to the Romans and in the words of Christ in St. Matthew 22:21 to "render therefore unto Caesar the things which are Caesar's, and unto God the things that are God's". Consequently, persons of the fundamental Christian faith believe that they have a Scriptural responsibility to obey all just laws. Moreover, they believe that Christ is their sovereign Lord in matters of religious obligation or duty. Paying any tax which is exacted upon religious exercise offends the conscience of plaintiffs as being

contrary to three doctrinal convictions held by them and historically held by their religious forebears: (1) the lordship of Jesus Christ; (2) liberty of conscience; and (3) separation of church and state.

12. For the plaintiffs as fundamental Christians, the Bible is the ultimate and infallible source of knowledge about God and about man, providing them a definitive manual for life on earth. It is the responsibility of each believer to humbly submit to the authority of Scripture and conform to its precepts. The plaintiffs believe that Scripture requires that (1) Christians provide for their own financial security; (2) to the extent that they are unable so to provide, the responsibility to aid them is that of the Church; (3) the freedom to choose the means by which this responsibility to its own people is exercised must remain with the Church and must not be taken away by government; and (4) the Church (including its members) may not participate in, or collaborate in, any effort of government to assume or preempt that religiously mandated responsibility.

13. Each employee of the Church and its ministries: must be a "born again" Christian whose life exemplifies Biblical separation from the world; must be of good Christian character, reflecting Christian attitudes and values in his or her conduct while at the workplace and in his or her personal life; and must actually have experienced a religious call to the vocation in which he or she is employed. The requirements of employment at the Church are based on Scriptural mandates.

14. The Church's doctrinal tenets require the establishing of its ministries (including the School). These ministries would not otherwise exist, but for their nature as expressions of religious responsibility. As a matter of Scriptural duty, the Church must provide for the financial well-being, through just remuneration, of those who exercise their religious vocation in its ministries.

15. The Church faith community believes that every person engaged in fulfillment of its ministries, whether as a non-compensated volunteer or as a compensated employee, is pursuing an individual religious ministry as well. In no sense does the Church view the overall ministry, or the individual

ministries of those engaged therein, as secular or commercial in nature. The functions performed by volunteers and employees of the Church in its ministries are religious functions governed and controlled by religious principles. The Church's workers are indispensable to the carrying on of the Church's ministry.

16. To fulfill a Scriptural responsibility, the Church in 1978 instituted a program of benefits for its employees to provide for their financial security. The program is funded through the Church with no contributions from the Church's employees. The program consists of life insurance, disability coverage, a pension program and medical care.

17. The only funds or other material assets possessed by the Church are those received through free-will offerings from its followers and through school tuition. The free-will offerings are given as mandated by Scripture to the stewardship of the Church, in trust, to be used solely for religious purposes.

18. Church funds are thus used to support employees who choose to work in the Church's ministries in furtherance of the Church's religious purposes and pursuant to the employee's religious vocation. Tuition charges for school attendance do not provide sufficient revenues, in and of themselves, to meet the costs of the School's operation.

19. Imposition of the Social Security tax now mandatorily applied to the Church would result in a coerced extraction and diversion of the Church's funds committed in trust to its stewardship from the religious purposes for which they were donated, to the secular purposes determined by government.

20. The Church could not make the irrevocable election pursuant to Section 3121(w)(2) of the Internal Revenue Code to shift the Social Security tax to a different locus within the Church. To have done so would not have altered the nature of the tax as a coercive tax on the Church, or lifted the burden thereof from the Church. Making the election would have resulted in doubling the rate of the Social Security tax imposed directly on the employees, without conferring self-employment status on them generally. The employees would thus have been saddled with the substantial burdens of the self-employment tax, but without the benefit of any of the offsetting tax deductions

and other tax benefits accorded self-employed persons generally. The tax would be imposed upon their gross income, as opposed to their net income, as would be the case with self-employed persons generally. Moreover, this election would have created confusing and complicated tax reporting demands both upon the Church and the employees, since the employees would be "employed" for all other tax purposes, but "self-employed" only for Social Security purposes. Out of justice to its workers, the Church could not acquiesce in the imposition of this situation upon them.

21. If the election under Code Section 3121(w)(2) had been made, and the Church did not increase its employees' wages to cover the doubled Social Security taxes, the Church's employees' net income would have been diminished substantially, thus hindering or eliminating the pursuit of their religious vocation in the Church's ministries, and consequently adversely affecting the ministries themselves. I am personally aware of a situation in another State where a Church which made the irrevocable election under Section 3121(w) promptly lost over 80% of its teachers because they could not afford to continue. As a result, the Church was forced to close its school, thus losing an important ministry. I am thus aware that the dangers of the election are real.

22. If the election had been made and the Church increased its employees' wages commensurate with the doubled Social Security taxes (and an additional amount needed to offset the consequent increased income taxes imposed upon them), the availability of the Church's ministries, such as the Christian school, would be endangered. This situation would have required an increase in school tuition and a general increase in the overall tithe to the Church, or else a reduction of employee staff in the Church ministries (with its inevitable consequence of curtailing the Church's ability to meet its religious obligations). Moreover, the consequences further described in paragraph 24 were sure to eventuate as well.

23. Since the election was not made, the Church, though having avoided imposition of the doubled rate of Social Security taxes directly on its employees, was nevertheless bound by a

religious requirement to increase its employees' wages to compensate for the substantial new tax burden imposed upon them.

24. The imposition of the new tax burdens on the Church (whether in its own name and/or through its workers), has already had the following results:

(a) Direct reduction of the Church's financial resources available to sustain its ministries, by an amount in excess of $160,000.00 (over $75,000.00 for 1984, and over $85,000.00 by the end of 1985).

(b) Forced substantial diminution of the life and disability insurance, and pension benefit plans for the Church's workers, thus interfering with the Church's provision for their security in a manner consonsant with Scriptural obligations.

(c) Forced raising of tuition for the School, with a consequent loss of students.

(d) Unwanted undertaking of substantial borrowing at prevailing commercial rates, due to forced operation at a deficit.

(e) The necessitating of extremely burdensome and time-consuming fund-raising efforts, the time and expense thereof being taken from the work of the ministry.

(f) Diminution of, and prevention of further contribution to, a (now very small) endowment fund recently established by the Church as a guard against adverse financial occurrences, thus returning the Church to a pay-as-you-go financial status and exposing it to further financial risks (and further decreasing its credit-worthiness when compelled to borrow).

(g) Reduction of the net disposable income of the workers, with its consequent pressures upon them to cease an employment they can no longer afford.

(h) Diversion of the net income of the workers to compensate for the loss of the Church's provision of insurance and retirement benefits.

(i) The necessitating of extremely burdensome, confusing and time-consuming record-keeping and tax reporting requirements, the time and expense thereof thus detracting from the work of the ministry.

Due to the absolute dependence of the Church upon voluntary contributions, all of the foregoing detriments are certain to increase in severity in the future. The Church, its members, and its workers are now at a critical point with respect to taxation, salaries and tuition. The Church cannot absorb any further increase in any of these items without fueling a downward spiral of tuition increases, decreased enrollment, and staff reductions. The cumulative effect of continued imposition of the Social Security tax program is extremely threatening to the future of the Church's work. Indeed, the economic consequences above described would also inevitably have eventuated had the Church made the election available to it under Section 3121(w)(2) of the Internal Revenue Code.

25. Imposition of the 1983 and 1984 Social Security Amendments to the Church (both in its own name and/or through and upon its workers) has already had the following additional consequences:

a. Coercive infringement upon the Church's religiously mandated self-governance by invading the Church's rights and religious obligations in relation to its religious employees as members of the Church faith community.

b. Forced participation in, and collaboration with, this government-operated program in violation of the Church's religiously mandated belief of separation of church and state and the sovereignity of the lordship of Jesus Christ.

c. Governmentally directed diversion of religiously donated funds from the religious ministry, to a government welfare program without the consent of the religious ministry or the ministry's donors.

d. Forced curtailment or diminution of many of the Church's religious ministries.

e. Eventual abandonment of the Church's employees' life and disability insurance, and pension plans, these plans being not only financially more advantageous to the workers, but also fully respecting of the integrity of the Church's doctrinal belief that the Church should make its own provision for the well-being of those engaged in its ministries.

All of the foregoing consequences erode and conflict with the practice of deeply rooted Christian and Baptistic beliefs, and would occur whether or not an election was made under Section 3121(w)(2).

26. Imposition of the 1983 and 1984 Social Security Amendments to the Church (both directly and through or upon its employees) has created, and will continue to require, ongoing administrative relationships between the Church and the government in violation of Scriptural precepts, and has forced the Church and the government into a coerced and unwanted partnership in which the two collaborate to discharge the Church's religious duty to its members.

27. Whether or not the election under Section 3121(w) was made, the Social Security Amendments of 1983 and 1984 unjustly penalize the Church's workers, since they are required to pay the Social Security taxes while other persons engaged in the pursuit of the same religious ministries (*i.e.*, ordained ministers) are not. Moreover, if the Church had made the irrevocable election under Section 3121(w), its workers would have suffered financial penalties and disadvantages not imposed upon employees of secular businesses.

28. The religious objections which the Church has raised as to the imposition of the Social Security program on them are based upon sincere and long-standing convictions. The convictional objections have not been reached in haste or without prayerful reflection upon the requirements of its religious faith and of its Scriptural responsibilities to its followers and to the government.

Further affiant sayeth not.

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF DAUPHIN)

VERIFICATION

I, Reverend Richard A. Harris, being duly sworn according to law, verify that the facts stated in the foregoing Affidavit are true to the best of my knowledge, information and belief.

/s/ RICHARD A. HARRIS
Reverend Richard A. Harris

Sworn to and subscribed before me this
23rd day of September, 1985.

/s/ DIANNE HAVERL
Notary Public
DIANNE HAVERL,
NOTARY PUBLIC
My Commission Expires April 9, 1989
Harrisburg, PA, Dauphin County

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BETHEL BAPTIST CHURCH, et al.	:	
Plaintiffs	:	
vs.	:	CIVIL ACTION
	:	NO. CV-84-1586
UNITED STATES OF AMERICA,	:	
Defendant	:	

AFFIDAVIT OF PAUL MARTIN, JR.

NOW COMES Paul Martin, Jr., of Richlandtown, Pennsylvania, being duly sworn according to law, who deposes and states on personal knowledge as follows:

1. I am a "born again" Christian who, as such, has accepted Jesus Christ as my personal savior. I believe that the Bible is the inerrant Word of God and the basic guide whereby I am to conduct my life.

2. I am a member of Bethel Baptist Church.

3. I am employed by Bethel Baptist Church to perform maintenance responsibilities for the Church.

4. I believe that my service at Bethel Baptist Church is a religious vocation. I am fulfilling God's calling upon my life by my service to the Church. All the work that I do in furtherance of my vocation I do as service unto the Lord.

5. Based upon the Scripture, I believe that I am required to provide for my own financial security. To the extent that I am unable so to provide, the responsibility to aid me is that of my Church.

6. I object, upon religious grounds, to the forced payment of Social Security tax as a result of my service to the Church, whether that tax is paid by myself or by the Church. Such forced payment violates my Scripturally-based religious convictions concerning the lordship of Jesus Christ, liberty of conscience, and separation of church and state.

7. I sacrificially serve the Church at wage levels below wage levels generally paid to maintenance workers in non-religious enterprises.

8. In addition to my wages, the Church remunerates me by providing a benefit program which consists of life insurance, disability coverage, pension plan, and medical care,

9. At my present level of income, it will be a substantial burden upon me to pay the Social Security tax, whether that tax be at a rate charged to self-employed persons or at the rate charged to employees.

10. Imposition of the Social Security tax upon me poses a real danger that I may be forced to leave my religious vocation in the Church ministry.

I declare under penalty of perjury that the foregoing is true and correct and, if called as a witness, I would competently testify thereto.

Further affiant sayeth not.

/s/ PAUL MARTIN, JR.
Paul Martin, Jr.

Sworn to and subscribed
before me this 23rd day
of September, 1985.

/s/ NANCY L. KENNA
Notary Public
NANCY L. KENNA, NOTARY PUBLIC
EAST ROCKHILL TWP.,
BUCKS COUNTY
MY COMMISSION EXPIRES
DEC. 13, 1986
Member, Pennsylvania Association of
Notaries

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BETHEL BAPTIST CHURCH, et al. *Plaintiffs*	:	
	:	CIVIL ACTION NO.
v.	:	CV-84-1586
	:	
UNITED STATES OF AMERICA, *Defendant*	:	

AFFIDAVIT OF PETER J. FERRARA

PETER J. FERRARA, being duly sworn according to law, deposes and states on personal knowledge as follows:

1. Prior to assuming my present position as attorney with the firm of Shaw, Pittman, Potts & Trowbridge, Washington, D.C., I served in the White House Office of Policy Development from 1982 to 1983. During my tenure in the White House, I was responsible, *inter alia*, for the development of policy positions with respect to Social Security. I am a graduate of Harvard College and the Harvard Law School, where I majored in law and economics. I am competent to testify to the matters stated herein.

2. My published writings have principally been devoted to the topic of Social Security, including four books, two chapters in books devoted to current policy topics, and articles in *The Wall Street Journal*, the *Washington Times*, and the *Journal of the Institute for Socio-Economic Studies*. The books on Social Security I have written include:

Social Security: The Inherent Contradiction (Cato Institute, 1980)
Social Security: Averting The Crisis (Cato Institute, 1982)
Social Security: The Family Security Plan (Heritage Foundation, 1982)
Social Security: Prospects For Real Reform (Cato Institute, 1985).

3. I have studied and carefully monitored all of the major policy proposals for Social Security and Social Security reform in recent years, and am familiar with current and past official projections of Social Security revenues and expenditures and the program's trust funds.

4. I have carefully examined the Complaint and Answer in the above-captioned matter. I have also carefully examined the Interrogatories submitted by the plaintiffs to defendants.

5. The latest official projections of the Social Security Administration state that Social Security, defined as the Old-Age and Survivors Insurance and Disability Insurance Programs, will have total revenues of $211.6 billion in fiscal year 1986, $230.2 billion in fiscal year 1987, $262.7 billion in fiscal year 1988, and $288.9 billion in fiscal year 1989. Current official actuarial projections indicate that the Social Security Administration believes that Social Security will have sufficient funds to pay promised benefits for at least the next 30 years.

6. The Senate Finance Committee, on March 11, 1983, issued Senate Report 98-23 to accompany Senate Bill 1. This bill was the product of the recommendations of the National Commission on Social Security Reform which had issued its Report on January 20, 1983. The Senate Report estimated anticipated revenue gains from expansion of coverage, based upon figures compiled by the Office of the Actuary of the Social Security Administration. For fiscal year 1984, it was estimated that $1.3 billion in new revenues would be achieved by covering nonprofit workers, with a total gain between 1983 and 1989 of $12.5 billion. This compared to a gain of $9.3 billion over the same time period for covering federal workers, and $3.2 billion for restricting termination of coverage for state and local government workers.

7. The 1983 Social Security Amendments also sharply increased the tax rates for FICA and SECA coverage. These rate increases, along with the other provisions of the Amendments, were projected to result in an increase in net revenue for the Social Security system of $169 billion over the period 1983-1989.

8. If refunds are paid to Bethel Baptist Church and its employees as a result of this action, the total amount paid in such

refunds would have a negligible effect on the trust fund balances of the Social Security System.

9. The Office of the Actuary of the Social Security Administration has recently estimated that even if refunds are made in fiscal year 1986 to *all* those religious organizations in the nation which first became subject to mandatory coverage on January 1, 1984, (a result not likely to ensue) the amount of FICA and SECA taxes which would be repaid would amount to only $199 million. The Actuary has also estimated that if *all* those religious organizations not covered prior to 1984, plus an additional 5% of those who were already covered in 1983 were released from the system, the revenue loss in fiscal year 1986 would amount to only $157 million. Compared to the total revenue projected for the system as a whole, the amount of revenue which would be lost from releasing *all* newly covered religious organizations from the taxes would be infinitesimally small, and would not affect the ability of the program to pay promised benefits in any significant way. Should only those religious organizations which object, out of religious principle, to the payment of Social Security taxes be released from mandatory coverage, the revenue loss would be even lower. It must be emphasized that a far more precise assessment could be made of the anticipated impact of the precedent effect of a decision granting a refund in this case should the information sought in plaintiffs' interrogatories be made available.

10. Should religious institutions which object on religious principle to the payment of Social Security taxes be exempted from mandatory participation, the exemption would not be burdensome or expensive for the Internal Revenue Service or Social Security Administration to administer.

11. Even if Social Security develops financial problems 30 years or more from now, releasing churches and their employees from mandatory Social Security taxes now will mean that Social Security will be released from the financial burden of paying benefits to such employees during any such future financial difficulties, easing those difficulties.

12. Should the employees of Bethel Baptist Church continue with private retirement and insurance programs, their

return on their funds, and the coverage of insurable risks thereunder, could be expected to be substantially more advantageous to them than participation in Social Security.

13. It is, therefore, my considered judgment that excluding Bethel Baptist Church and employees from mandatory coverage will not disrupt the administration of the Social Security System, nor will it affect in any significant way the revenues enjoyed by that system or the ability of the system to pay promised benefits and indeed may even ease any long-term financial problems of the system. This same result would likely obtain even if all other religious institutions which object, on religious grounds, to mandatory coverage were to be similarly excluded.

Further affiant sayeth not.

/s/ PETER J. FERRARA
Peter J. Ferrara

Sworn to and subscribed
before me this 20th
day of September, 1985.

/s/
Notary Public

APPENDIX H

IN THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

BETHEL BAPTIST CHURCH, et al., *Plaintiffs*	:	
	:	CIVIL ACTION
v.	:	NO. 84-1586
UNITED STATES OF AMERICA, *Defendant*	:	

RESPONSE TO PLAINTIFF'S FIRST INTERROGATORIES

Defendant responds to Plaintiff's First Interrogatories as follows:

INTERROGATORIES

1. Identify all government-conducted, government-sponsored or government-funded studies relating to coverage of employees of non-profit and/or religious institutions under the Social Security system.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

2. Identify all persons who were responsible for compiling the statistics, relating to coverage of employees of non-profit and/or religious institutions under the Social Security system, as reported in Senate Report No. 98-23, House Report 98-25, and House Conference Report 98-47.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether

the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

3. Identify all persons within the Department of the Treasury, the Department of Justice or any other agency of the United States Government who had correspondence, communication or contact with members of Congress or Congressional staff respecting coverage and/or exemption under the Social Security system for employees of religious institutions, with respect either to Public Law 98-21, S. 2099 (98th Cong., 1st Sess.) (including any hearings related thereto or to any consideration of any other modification of the mandatory coverage of such organizations imposed by Public Law 98-21), or Public Law 98-369.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

4. Specify the number of non-profit (including religious) institutions, and the number of employees of such institutions which or who were not covered under the Social Security system prior to January 1, 1984, and who became covered under that system as of that date. Specify the source for such statistics, the persons compiling such statistics, and the manner in which they were compiled or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

5. Specify the number of religious institutions, and the number of employees of such institutions, which or who were not covered under the Social Security system prior to January 1, 1984, and who became covered under that system as of the date.

Specify the source for such statistics, the persons compiling such statistics, and the manner in which they were compiled or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

6. Specify the total revenue realized during calendar year 1984 as a result of Social Security coverage of employees of non-profit (including religious) institutions, not covered prior to January 1, 1984. Identify the sources for any such revenue figures, and the manner in which they were compiled and/or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

7. Specify the total revenue realized during calendar year 1984 as a result of Social Security coverage of employees of religious institutions, not covered prior to January 1, 1984. Identify the sources for any such revenue figures, and the manner in which they were compiled and/or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

8. Specify the number of religious institutions, and the number of employees thereof, for which an election was made for treatment of employees as self-employed persons under Section 2603 of Public Law 98-369. Identify the sources for such statistics, the person compiling such statistics, and the manner in which such statistics were compiled or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

9. Specify, by type and amount, the administrative costs associated with collection of Social Security taxes from non-profit (including religious) institutions not covered prior to January 1, 1984, for the calendar year 1984. Identify the sources for such statistics, the person compiling such statistics, and the manner in which such statistics were compiled or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

10. Specify, by type and amount, the administrative costs associated with collection of Social Security taxes from religious institutions not covered prior to January 1, 1984, for the calendar year 1984. Identify the sources for such statistics, the person compiling such statistics, and the manner in which such statistics were compiled or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

11. Specify, by type and amount, the administrative costs associated with administering the election permitted by Section 2603 of Public Law 98-369. Identify the sources for such statistics, the person compiling such statistics, and the manner in which such statistics were compiled or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is

relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

12. Specify the total number of persons who have applied for, and have been granted, exemption from self-employment taxes under 26 U.S.C. §1402(e), and, by separate listing, the total number of such persons for each calendar year the exemption has been in effect. Specify the source of any such statistics, and the manner in which such statistics were compiled and/or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

13. Specify the number of persons who have applied for, and have been granted, exemption from self-employment taxes under 26 U.S.C. §1402(g), and, by separate listing, the total number of such persons for each calendar year the exemption has been in effect. Specify the source of any such statistics, and the manner in which such statistics were compiled and/or derived.

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

14. Specify any other items considered by the Defendant United States of America to be a part of the legislative history of Public Law 98-21 or Section 2603 of Public Law 98-369, other than the items requested in Plaintiffs' First Request for Production of Documents numbers 2, 3, 4, 7, 8, 12, 13, 14, 15, or 16.

RESPONSE: Objection. The official Legislative Histories of Public Laws 98-21 and 98-369 are set forth, respectively, at 97 Stat. 172 and 98 Stat. 1210. To the extent defendant believes

that additional appropriate materials which properly evidence the legislative histories of these statutes should be brought to the Court's attention at the time this case is briefed or argued, defendant reserves the right to do so, and defendant objects to the apparent attempt of this Interrogatory to limit the scope of such materials which defendant might seek to bring to the Court's attention at such time.

15. Specify all federal taxes, other than Social Security taxes, unemployment taxes, or unrelated business income taxes, which are required by Defendant United States of America to be paid by religious institutions.

RESPONSE: Objection. The Interrogatory is a pure question of legal research, the answer to which is contained in the United States Code, and which can be researched and answered as well by plaintiff as by defendant.

16. Based upon current actuarial projections, what is the ratio of benefits which can be expected to be paid to each covered employee under the Social Security system versus the amount of employer and/or employee contributions paid on behalf of that individual? What percentages of these benefits would be expected to be paid as old age benefits? Survivors benefits? Disability benefits? Health care benefits? Other benefits paid from Social Security funds (specify by type)?

RESPONSE: Objection. The Interrogatory is not reasonably calculated to lead to the discovery of evidence which is relevant to the issue raised in the Complaint, namely, whether the challenged provisions of the Internal Revenue Code are constitutional; the statutes and legislative histories speak for themselves.

17. Identify all persons whom Defendant expects to call as witnesses at trial herein, and describe the scope and subject matter of the expected testimony of each such witness.

RESPONSE: Defendant believes that this case can and will be decided on motion for summary judgment, and that testimony will be neither necessary nor appropriate.

18. Identify all persons by name and title, other than counsel, who participated in the preparation of the answers to

the foregoing Interrogatories, and note the Interrogatories as to which each such person provided assistance or information.

RESPONSE: All answers and objections were prepared by the undersigned counsel.

CERTIFICATION

I, ROBERT L. GORDON, certify that the foregoing responses to interrogatories are, to the best of my present knowledge, true.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Washington, D.C., this 10th day of July, 1985.

/s/ ROBERT L. GORDON
Robert L. Gordon

AS TO OBJECTIONS:

James J. West
United States Attorney

Holly K. Harris
Assistant United States Attorney

/s/ ROBERT L. GORDON
Edward J. Snyder
Robert L. Gordon
Attorneys, Tax Division
U.S. Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6438

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that the foregoing RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS and RESPONSE TO PLAINTIFF'S FIRST INTERROGATORIES were served upon counsel for plaintiffs this 10th day of July, 1985, by depositing a copy in the United States Mail, postage prepaid, addressed as follows:

William Bentley Ball, Esquire
Ball and Skelly
Post Office Box 1108
Harrisburg, Pennsylvania 17108

/s/ ROBERT L. GORDON
Robert L. Gordon

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-902

In the Supreme Court of the United States

OCTOBER TERM, 1987

BETHEL BAPTIST CHURCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
GARY R. ALLEN
TERESA E. MCLAUGHLIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether mandatory participation in the social security system by church employees violates the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-902

BETHEL BAPTIST CHURCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 822 F.2d 1334. The opinion of the district court (Pet. App. 18a-43a) is reported at 629 F. Supp. 1073.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1987. On September 8, 1987, Justice Brennan extended the time to file a petition for a writ of certiorari to and including November 27, 1987, and the petition was filed on November 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Bethel Baptist Church (Bethel) is an independent Baptist Church governed by its members. The other petitioners are various church officers, employees, or parents of children who attend Bethel's school. In operating

that school and various other ministries, Bethel employs church members who are "born again" Christians and who have experienced a religious call to their respective vocations. Although those employees earn less than they could in comparable secular positions, they choose to work for Bethel because of their religious beliefs. Pet. App. 2a-3a.

Bethel's members believe that Scripture requires them to provide for their own financial security, and, if they cannot do so, Bethel must provide for them by means of its own choosing. As a matter of religious principle, Bethel's members oppose any governmental attempt to assume that responsibility to provide for them or to dictate the means by which Bethel discharges its own duty to support its members. In accordance with these beliefs, since 1978 Bethel has maintained its own private social program for the care of its employees, which provides life insurance, disability and medical care coverage, and pension benefits. Pet. App. 3a.

Prior to 1984, the Internal Revenue Code[1] exempted from social security coverage services performed by employees of organizations qualifying for tax-exempt status under Section 501(c)(3) of the Code. See 26 U.S.C. 3121(b)(8)(B). Accordingly, Bethel and its employees were exempt from social security taxes.[2] In 1983, however, Congress amended the Social Security Act and the Internal Revenue Code to extend mandatory social security coverage to the employees of non-profit organizations, including churches, effective January 1, 1984. See Social Security Amendments of 1983, Pub. L. No. 98-21, § 102(b)(2) and (c), 97 Stat. 71. In 1984,

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

[2] Tax-exempt organizations had the option of electing to participate in the social security system (see 26 U.S.C. 3121(k)), but Bethel never waived its exemption from coverage.

Congress partially restored the exemption for churches and certain church-controlled organizations, retroactive to January 1, 1984. See Section 2603(b) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 1128-1129. The 1984 amendment, which added Section 3121(w) to the Code, permits churches and church-controlled organizations that are opposed for religious reasons to social insurance to elect irrevocably to exempt themselves from social security taxation. This exemption, however, extends only to the electing church or church-controlled organization itself; its employees then become subject to the self-employment tax (see I.R.C. §§ 1401, 1402(c)(2)(G)), which is currently imposed at a rate equal to the combined employer and employee social security tax rates.[3]

On April 30, 1984, Bethel filed an employer quarterly tax return for the first quarter of 1984, reporting a total social security tax liability of $17,795, which it paid. On May 3, 1984, Bethel filed an administrative claim for refund of those taxes on behalf of itself and its employees. On September 4, 1984, the Internal Revenue Service (IRS) informed Bethel of the opportunity to elect not to be

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[3] The amendment did not disturb two previously existing exemptions from social security tax coverage. Section 1402(e) of the Code prescribes conditions under which ministers, members of religious orders, and Christian Science practitioners opposed as a matter of religious principle to social insurance programs, may obtain exemptions from self-employment tax imposed on income received with respect to services performed in that religious capacity. Section 1402(g) of the Code allows an exemption from the self-employment tax to persons who, by reason of their adherence to the established tenets of (and membership in) certain religious sects, are opposed to accepting the benefits of social insurance. The exemption is conditioned upon the waiver of all social security benefits by such individuals and the determination by the Secretary of Health and Human Services that the sect (1) has the requisite tenets or teachings, (2) has a history of making provision for its dependent members, and (3) has been in existence at all times since December 31, 1950.

subject to the employer portion of the tax and advised it that the deadline for making the election was October 30, 1984. Bethel chose not to make such an election by that time, however, and the IRS thereafter denied Bethel's claim for refund. Pet. App. 5a-6a.

2. Petitioners then brought this suit in the United States District Court for the Middle District of Pennsylvania, asserting that the new statutory scheme violates both the Free Exercise and Establishment Clauses of the First Amendment and also the equal protection component of the Due Process Clause of the Fifth Amendment. The district court, relying primarily on this Court's decision in *United States* v. *Lee*, 455 U.S. 252 (1982), granted summary judgment in favor of the government (Pet. App. 18a-43a). The court reasoned that the legislation did not violate the Free Exercise Clause because "[t]he broad public interest in maintaining a sound tax system is of such high order that religious belief in conflict with the payment of taxes affords no basis for resisting the tax" (*id.* at 33a). The court also concluded that the statutory scheme did not foster an excessive entanglement with religion in contravention of the Establishment Clause (*id.* at 40a-41a). Finally, the court rejected petitioners' claim that the extension of social security coverage to church employees, while retaining exemptions for ministers, members of religious orders and Christian Science practitioners under Section 1402(e) of the Code (see note 3, *supra*), violates the equal protection component of the Due Process Clause (Pet. App. 42a).

3. The court of appeals affirmed (Pet. App. 1a-16a). The court rejected petitioners' Free Exercise Clause argument (*id.* at 8a-11a), explaining that this Court's holding in *Lee* that "the government's interest in tax collection outweighs any private religious interest in the nonpayment of taxes" was controlling (*id.* at 9a). With respect to petitioners' Establishment Clause argument, the court explained

that social security taxation does not foster excessive entanglement (*id.* at 11a-13a); instead it "require[s] only the unobtrusive type of governmental inquiries which the state may undertake to ensure that records are kept in accordance with the Fair Labor Standards Act * * * and local fire and zoning regulations" (*id.* at 12a-13a). The court of appeals also rejected petitioners' contention that the new statutory scheme violates equal protection (Pet. App. 13a-15a). The court explained that the limited exceptions of Section 1402(e) and (g) were constitutionally permissible because, in fashioning the exemptions, "Congress sought to accommodate secular, first amendment concerns and attempted reasonably to guarantee the fiscal integrity of a social insurance program" (Pet. App. 15a).

ARGUMENT

The court of appeals correctly rejected petitioners' contention that the social security tax amendments enacted by Congress in 1984 are unconstitutional. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners' primary contention (Pet. 6-14) is that the manner in which the social security tax has been extended to employment by churches violates the Free Exercise Clause of the First Amendment. Arguing that employment by Bethel is a "religious activity" (Pet. 6), petitioners maintain that the requirement that churches either pay social security tax like other employers or elect not to pay that tax, rendering their employees subject to the tax at self-employment rates, burdens "the Church's very means of existence" (Pet. 7). As the court of appeals held, this contention is without merit. Indeed, it is squarely foreclosed by this Court's recent decision in *United States* v. *Lee*, 455 U.S. 252 (1982).

In *Lee*, an Amish employer claimed that it was unconstitutional to require him to pay social security tax, because participation in the social security system violated his religious beliefs. The Court accepted the employer's assertion that the payment of the social security tax was forbidden by the Amish faith and hence agreed that the law "interfere[d] with [his] free exercise rights" (455 U.S. at 257). The Court explained, however, that this conclusion marked only the beginning of the inquiry because a limitation on the free exercise of religion does not violate the First Amendment if it is "essential to accomplish an overriding governmental interest" (*id.* at 257-258). The Court concluded that there existed such an overriding government interest "in assuring mandatory and continuous participation in and contribution to the social security system" (*id.* at 258-259). And the Court found that the plaintiff's religious beliefs could not be accommodated by means of a special exception because permitting "myriad exceptions flowing from a wide variety of religious beliefs" would seriously interfere with the functioning of the tax system (*id.* at 260). The Court concluded (*ibid.*): "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."

The court of appeals correctly held that "*Lee* demonstrates that with respect to the social security tax, the government's interest in tax collection outweighs any private religious interest in the nonpayment of taxes" (Pet. App. 9a), and that *Lee* is controlling here. Petitioners' contention (Pet. 10) that *Lee* is distinguishable is insubstantial. The First Amendment protects the free exercise of religion by every individual; there is no basis for finding that a burden imposed upon that free exercise is constitutional when imposed upon an individual, yet the identical burden is unconstitutional when imposed upon a religious institution like a church. Indeed,

the burden on free exercise was greater in *Lee* than it is here because the social security system does not unavoidably require churches to pay social security tax. Unlike the employer in *Lee*, Bethel could have elected not to be subject to the employer portion of the tax at all, but it chose not to do so.

Petitioners' objection appears to rest in part, not on the fact that social security is contrary to Bethel's religious tenets, but rather on the assertion that the payment of social security tax is a "forced diversion of religiously entrusted funds" (Pet. 10; see also Pet. 7)—either because the church pays the tax directly or because, if it elects to be exempt from the tax, it then would find itself morally obligated to raise the salary of its employees to make up for the increased tax burden on them. That objection is plainly without merit. As this Court explained in *Lee* (455 U.S. at 260), the same objection could be made to the imposition of income tax upon church employees. The First Amendment does not create an exemption from the payment of generally applicable taxes simply because of a religiously-based objection to the use to which the funds may be put by the government.[4] In the words of the court of appeals, "the public interest in the social security system outweighs any private

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[4] Petitioners' reliance on *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), is misplaced. That case involved a license tax aimed specifically at the protected activity of preaching, but the tax involved here extends to all segments of society and applies equally to virtually all employers, employees, and self-employed individuals. The indirect financial effect of the tax asserted by the church—*i.e.*, inducing it to raise its wages to compensate its employees for the added tax—is no greater than the burden imposed on all employers. Even if that wage raise is viewed as necessarily compelled by the tax, it certainly cannot be regarded, as petitioners suggest (Pet. 8-9), as a special tax upon the exercise of religious activity. By the same token, *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970), which involved an Establishment Clause challenge to *granting* tax exemptions to churches, has no bearing on this Free Exercise Clause challenge to the imposition of a tax.

religious interest in non-statutory exemption from social security taxation" (Pet. App. 9a-10a).

2. Petitioners also briefly contend (Pet. 14) that the social security system violates equal protection because Congress has retained some limited exemptions from social security coverage for certain specified taxpayers, namely, ministers, members of religious orders, and Christian Science practitioners who have a conscientious objection to the payment of such taxes (see I.R.C. § 1402(e); see also § 1402(g)). But it is well settled that "[n]either due process nor equal protection imposes * * * any rigid rule of equality of taxation" (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937)). Congress has wide latitude in making classifications for taxation purposes. See, *e.g.*, *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-585 (1937). As the court of appeals held (Pet. App. 14a), these exemptions, which are restricted to self-employment income derived from religious activities and thus are not directly comparable to the exemption that petitioners seek, do not impermissibly distinguish on a religious basis. Instead, they reflect rational distinctions made on the basis of secular, administrative concerns.

The legislative history shows that Congress enacted these provisions with the valid purpose of accommodating sincere religious beliefs to the extent compatible with the overriding interest in maintaining a comprehensive national social insurance program. See H.R. Rep. 213, 89th Cong., 1st Sess. 101-102 (1965); S. Rep. 1987, 83d Cong., 2d Sess. 9 (1954). And these exemptions have consistently been upheld by the lower courts against the equal protection claim that they are too narrowly drawn. See *Ballinger* v. *Commissioner*, 728 F.2d 1287, 1292-1293 (10th Cir. 1984); *Templeton* v. *Commissioner*, 719 F.2d 1408, 1413-1414 (7th Cir. 1983); *Olsen* v. *Commissioner*, 709 F.2d 278, 283 (4th Cir. 1983); *Jaggard* v. *Commissioner*, 582 F.2d 1189, 1190 (8th Cir.

1978), cert. denied, 440 U.S. 913 (1979); see also *United States* v. *Lee*, 455 U.S. at 260-261 (noting that Section 1402(g) accommodates religious practices in this regard "to the extent compatible with a comprehensive national program"). The fact that Congress has determined against further expansion of these exemptions because that would not "ensure that the social security system would remain financially sound and not be undermined by an excessive number of exemptions" (Pet. App. 15a) does not create an equal protection violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60319

Supreme Court, U.S.
FILED
MAR 9 1988
JOSEPH F. SPANIOL,
CLERK

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BETHEL BAPTIST CHURCH, *et al.*,

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Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. The Government misrepresents the burden of the tax herein by saying that the burden imposed on the taxpayer in *United States v. Lee*, 455 U.S. 252 (1982) was "identical" with the burden imposed "upon a religious institution like a church." (Brief In Opposition, 6). While, as petitioners have pointed out (Petition, 10), the religious rootedness of the claim of the secular businessman in *Lee* was more assumed than proved, it begs belief to assert that the burden upon religion through the taxing of *churches* (*i.e.* the demonstrable and direct hardships and loss of capacity imposed upon their congregations and of the various religious activities which are their ministries) is "identical" to the burden upon religion through the taxing of a for-profit commercial enterprise producing and selling finished lumber.

2. The Government's attempt to distinguish *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), rests upon a misunderstanding of the facts of the present case and of the facts and *ratio decidendi* in *Murdock*. *Murdock* did *not* involve "a tax specifically aimed at the protected practice of preaching." (Brief In Opposition, 7, n.4). It was instead a general tax on all persons canvassing or soliciting. (*Murdock*, *supra*, at 106). It was held unconstitutional because of its effect on religious exercise. The tax here is a specific *excise* tax on "the right to employ" (*United States v. Glenn L. Martin Co.*, 308 U.S. 62, 65 (1939)). The

Church's employments are the ministries by which it exists. The tax here, like the tax in *Murdock*, directly burdens the religious exercise of carrying out a ministry. It is irrelevant to say, as does the Government, that the financial effect of the social security tax is "no greater than the burden imposed on all employers." (Brief In Opposition, 7, n.4). Due to the Free Exercise Clause, direct taxation of a church, by reason of the exercise of its religion, is not comparable to the taxation of secular entities.

3. The Government's assertion that the Church could have "elected not to be subject to the employer tax at all" and "chose not to do so" (*id.* at 7) is transparently false. The record establishes precisely the contrary. The Church had *no* choice, as Paragraphs 16 through 25 of the uncontradicted Harris affidavit (Petition, 54a-58a) so clearly show. That is an unalterable, central "given" in this case (*Bethel Baptist Church v. United States*, 629 F.Supp. 1073, 1080-1081 (M.D.Pa. 1986)),* and to argue as though it were not is simply to argue a case not before this Court.

4. The Government is incorrect in asserting that the Church's objection to the tax arises "simply because of a religiously based objection to the use to which the funds may be put by the government." (Brief In Opposition, 7). The Church has not objected to the *use* to which the tax exactions would be put (support of the social security program), but to the exaction itself, whose primary adverse effect is devastating injury to its ministry. The Church employee's obligation to pay the "Self Employment" tax (which would result if the church had chosen "Exemption") is not comparable to his or her obligation to pay income tax. The income tax does not single out church employees for special, highly discriminatory treatment. But the peculiar "Self Employment" tax (26 U.S.C. §1402(j)), falsely classifies and specially burdens one employed by a church by doubling his tax rate and denying him deductions against gross income —

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*The Government is less than accurate when it characterizes the Church as merely "morally obligated" to raise salaries. *Financial necessity*, as well as moral obligation, made this mandatory. See Harris affidavit, Petition, 54a-58a.

solely because he chooses to work for his church. That imposition, enacted after *Lee*, has yet to be addressed in terms of the constitutional objections raised here.

5. The Brief In Opposition avoids the opening question presented by petitioners: whether the Free Exercise Clause "bars the *taxation* of the *religious activity* of *churches*." The Government attempts to shift the Court's focus away from those three dominant themes of this litigation by making the question appear to be one pertaining merely to employee participation in the social security system. That reconstruction of what is at stake in this case veils the major importance of this first-ever federal tax on religious exercise.

In light of the failure of the Government to come to grips with the issues raised in the Petition, and of its gross distortion of *United States v. Lee*, plenary review is essential.

March 8, 1988

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